IN THE

Supreme Court of the United States

October Term, 1976

No. .....

——76-9771

VOLVO OF AMERICA CORPORATION,

Petitioner,

vs.

THE HONORABLE WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California,

Respondent.

CHARLENE P. ROSACK, individually, and on behalf of all others similarly situated,

Real Parties in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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THE HONORABLE WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California,

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CHARLENE P. ROSACK, individually, and on behalf of all others similarly situated,

Real Parties in Interest.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner, Volvo of America Corporation, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 11, 1976.

Opinion Below.

The unpublished opinion of the Court of Appeals appears in the Appendix hereto. The unpublished opin-

ion rendered by the District Court for the Northern District of California appears in the Appendix hereto. Additionally, the unpublished findings and conclusions of the United States Magistrate to whom the remand proceedings were originally referred, appears in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 11, 1976. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented.

1. Can this Court's holding in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976), be circumvented by the simple invocation of 28 U.S.C. §1447(c) in a remand order, even though the grounds stated for remand are not authorized by §1447c?

2. Is this Court's holding in *Thermtron* to be construed as applicable only to the unique facts of that case, or is it to be given an interpretation consonant with the spirit of the majority opinion? Will this court allow *Thermtron* to be overruled *de facto* by permitting a District Court Judge to prevent review of a remand order simply by citing 28 U.S.C. §1447(c)?

3. Under 28 U.S.C. §1447(c), does the District Court have authority to remand an entire class action case to state court notwithstanding a finding by the Court that complete diversity exists, and that at least some plaintiffs have claims in excess of the jurisdictional amount?

Statutory Provisions Involved.

United States Code, Title 28:

Section 1447(c):

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs. A certified copy of the Order of Remand shall be mailed by its clerk to the clerk of the state court. The state court may thereupon proceed with such case."

Section 1441(a):

"Except as otherwise expressly provided by act of Congress, any civil action brought in a state court of which the District Courts of the United States have original jurisdiction, may be removed by the defendant or the defendants to the District Court of the United States for the district and division embracing the place where such action is pending."

Section 1332(a):

"The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different states; . . ."

Statement of the Case.

This case is an individual and class action originally brought in a state court in California, alleging violations of the California Anti-Trust Laws. The Petitioner, Volvo of America Corporation (hereinafter "Volvo") filed

a timely Petition for Removal, and the case was removed to the United States District Court for the Northern District of California. Removal was based on 28 U.S.C. §1332(a) and §1441(a).

Subsequent to the removal, the plaintiff moved to remand the action to State Court. The motion for remand was referred to the Honorable Owen E. Woodruff, Jr., United States Magistrate for hearing and decision. On June 8, 1976, the Magistrate submitted his findings and recommendations in which he concluded that "there is more than $10,000 in controversy in this litigation" and that "the diversity requisite to federal court jurisdiction appears to be the fact." The Magistrate's findings and recommendations appear in the Appendix hereto.

Pursuant to the local court rules, the plaintiff filed a Notice of Objections to the Magistrate's findings and recommendations, and the matter was heard before the respondent District Court Judge, the Honorable William W. Schwarzer.

The principal issue before the District Court was whether the requisite amount in controversy was present between the plaintiffs and defendants. Plaintiff purports to represent a class consisting of all persons, natural or legal, who purchased new Volvo automobiles at retail in California since January 1, 1967. Plaintiff seeks treble damages and attorneys' fees, under the authority of the applicable California statute, California Business and Professions Code §16750. It is uncontroverted that statutorily authorized treble damages and attorneys' fees are to be included in calculating the amount in controversy for federal jurisdictional purposes. *Missouri State Life Insurance Company v. Jones,* 290 U.S. 199, 202, 78 L.Ed. 267, 269 (1933).

No formal evidentiary hearing was held by the District Court to determine the existence of plaintiffs with claims in excess of the jurisdictional amount. However, at the Court's request, Volvo submitted affidavits detailing the existence of several class members who would clearly have claims in excess of $10,000. These affidavits were the result of a "spot check" of Volvo dealers in California and the list of plaintiffs included therein was not meant to be exhaustive.

On October 20, 1976, the District Court entered an order setting aside the Magistrate's findings and recommendations and remanding the action to State Court. A copy of the District Court's order appears in the Appendix. The District Court found that jurisdiction existed over at least "a few members of" the class. However, notwithstanding that finding, the Court remanded the entire action on the grounds that "the action could not be maintained in this Court on behalf of the class for which it was brought". Remand Order, page 7, lines 2 through 4.

In subsequent proceedings, the effective date of the remand order was stayed by the District Court until October 29, 1976. The express purpose of the stay was to afford Volvo an opportunity to seek relief from the United States Court of Appeals for the Ninth Circuit. In staying the order, the District Court implicitly ordered that no part of the file in the case, nor a certified copy of the remand order, be transmitted to the State Court.

On October 28, 1976, Volvo filed with the Court of Appeals a Petition for Writ of Mandamus and/or Prohibition, requesting the Court to issue a writ commanding the District Court to set aside the Order of Remand and retain jurisdiction over the action.

On the same day, the Court of Appeals entered an order staying the District Court's Order of Remand until November 12, 1976, or until further order of the Court, whichever occurred first, in order to allow a motions panel of the Court of Appeals to consider the Petition for Writ of Mandamus. Copies of the Petition for Writ of Mandamus and/or Prohibition, and the order of the Court of Appeals appear in the Appendix hereto.

On November 11, 1976 the Court of Appeals denied the Petition for Writ of Mandamus and/or Prohibition.

On November 12, 1976, Volvo applied to the Hon. William Rehnquist for a stay of the remand order pending filing of a petition for certiorari with this Court. The application was denied on November 15, 1976. A copy of Justice Rehnquist's Opinion on Chambers appears in the Appendix hereto.

REASONS FOR GRANTING THE WRIT.

I.

A Remand Order Based on Grounds Not Authorized by 28 U.S.C. §1447(c) Is Reviewable. The Mere Citation of §1447(c) Does Not Prevent Review.

The principal issue presented by this petition is whether a District Court Judge can bar review of a remand order simply by invoking 28 U.S.C. Section 1447(c), even though the grounds stated for remand are not authorized by Section 1447(c). If this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976) is to have any meaning, a District Court Judge should not be able to circumvent the clear purpose of *Thermtron* by merely invoking the magic words "1447c."

According to *Thermtron,* the only remand orders which are immune from review are those "*issued under 1447c and invoking the grounds specified therein—that removal was improvident and without jurisdiction*" (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 551.

Since the District Court's opinion herein did not invoke the grounds authorized by Section 1447(c), but rather was grounded on extraneous considerations relating to class action procedures, the remand order should not be immune from review. To construe *Thermtron* in any other manner would mean that the District Court Judge in Kentucky, who remanded properly removed cases because of his heavy docket, could continue this practice simply by adding the citation "28 U.S.C. Section 1447(c)" to his opinions. Surely this Court could not have intended such a result.

This is the interpretation suggested by Justice Rehnquist in the In Chambers Opinion denying petitioner's application for a stay of the remand order (See Appendix). If certiorari is denied the instant case, Justice Rehnquist's opinion will stand as the only interpretation of the scope of the *Thermtron* ruling.

II.

The District Court's Remand Order Was Not Authorized by 28 U.S.C. §1447(c), and Constituted an Act in Excess of Its Jurisdiction.

The District Court made the finding that several plaintiffs had claims in excess of $10,000. As noted previously, this finding was not based on an exhaustive survey of all potential class members, but rather on a sampling of approximately 20% of the Volvo dealers in the state of California. Further, the District Court never specifically found that the named plaintiff, Charlene Rosack, did not have a claim in excess of $10,000. The court simply stated that such a finding would not have affected the result. Remand Order, page 6, footnote 3.

The sole ground for the District Court's order was that a majority of the purported class members would not have claims in excess of $10,000:

> "Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. §1447(c)." Remand Order, page 7, lines 2 through 4.

The District Court's use of Section 1447c is a complete *non sequitur*. The court states that the suit must be remanded because it "could not be maintained in

this court on behalf of the class for which it was brought." Then, almost as an afterthought, the court cites 28 U.S.C. §1447(c).

Section 1447(c) authorizes remand only where an action "was removed improvidently *and without jurisdiction*" (Emphasis added). *The District Court, having found that jurisdiction existed over at least several plaintiffs, was without authority to remand the entire action to State Court.*

This court in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L.Ed.2d 542 (1976) held that a District Court exceeds its authority in remanding a case on grounds not permitted by §1447(c). 46 L.Ed. 2d at 550. In *Thermtron,* the controlling factor in the District Court's remand order was the Court's heavy docket. As this court stated,

> "This consideration however is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under §1441 and hence to the question whether this cause was removed 'improvidently and without jurisdiction' within the meaning of the statute." *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 550.

In the present case, the District Court based its remand order on considerations relating to the maintenance of a class action. The District Court thus allowed Rule 23 of the Federal Rules of Civil Procedure to defeat properly attached federal jurisdiction. Rule 82 of the Federal Rules of Civil Procedure clearly states that the Rules are not to be construed to affect jurisdiction:

"These Rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein."

The District Court's remand order was not authorized by the provisions of 28 U.S.C. §1447(c). The order was therefore an act in excess of the Court's jurisdiction, and, pursuant to the *Thermtron* decision, subject to review by writ of mandamus.

III.

The Court of Appeals' Denial of the Petition for Writ of Mandamus Was Contrary to and in Conflict With the Applicable Decisions of This Court.

The *Thermtron* case clearly established the principle that an order of remand entered by a District Court on grounds not authorized by 28 U.S.C. §1447(c) is subject to review by writ of mandamus:

"Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That Section and Section 1447(c) must be construed together, as this Court has said of the predecessors to these two sections in *Employers' Reinsurance Corp. v. Bryant,* 299 U.S. 374, 380-381, 81 L.Ed. 289, 57 S. Ct. 273 (1937), and *Kloeb v. Armour and Company,* 311 U.S. 199, 202, 85 L.Ed. 124, 61 S. Ct. 213 (1940). These provisions, like their predecessors, are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . .' *Employers' Reinsurance Corp. v. Bryant, supra,* at 380, 81 L.Ed. 289, 57 S. Ct. 273. *This means that only remand orders issued under 1447c and involving the grounds specified therein—that removal was improvident*

and without jurisdiction—are immume from review under Section 1447d." (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 551.

After holding that §1447(d) does not bar review of remand orders not issued on grounds specified in §1447(c), this court noted

"There remains the question whether absent the bar of §1447(d) against appellate review, the writ of mandamus is an appropriate remedy to require the District Court to entertain the remanded action. *The answer is in the affirmative.*" (Emphasis added) *Thermtron Products, Inc. v. Hermansdorfer, supra,* 46 L.Ed.2d at 554.

In denying the Petition for Writ of Mandamus in the present case, the Court of Appeals acted in conflict with the *Thermtron* decision. Certiorari is therefore appropriate and is the only method available to petitioner to protect its statutory right to litigate this matter in federal court.

IV.

This Case Raises the Issue of the Proper Standard for Removal Jurisdiction Over Class Actions. This Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

This court, since the advent of Rule 23 of the Federal Rules of Civil Procedure, has been called upon to decide numerous and significant issues involving class action suits. See, for example, *Snyder v. Harris,* U.S. 332, 22 L.Ed.2d 319, 89 S.Ct. 1053 (1969); *Zahn v. International Paper Corporation,* 414 U.S.

291, 38 L.Ed.2d 511, 94 S.Ct. 505 (1971); *Eisen v. Carlisle and Jacquelin,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140 (1974).

This case raises an important question regarding the effect of class action procedures on federal jurisdiction in the removal context, a question which has not yet been settled by this court. The issue presented is whether a District Court can remand a properly removed class action where some, but not all, members of the class meet the federal jurisdictional requirements. It is an issue of substantial importance, and one on which lower federal courts have taken differing positions. Compare, for example, *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972) and *Knapp v. Bankers Securities Corporation,* 17 FRD 245 (E.D. Pa. 1954) with *Kinsey v. General Motors Acceptance Corp.,* 359 F.Supp. 36 (D.N.D. 1973).

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX.

On Application of Stay.

Supreme Court of the United States.

Volvo Corporation of America, Applicant, v. William W. Schwarzer, Judge, United States District Court for the Northern District of California (Charlene P. Rosack, etc., et al., Real Parties in Interest). No. A-395.

[November 15, 1976].

Mr. Justice Rehnquist, Circuit Justice.

Applicant seeks a stay of an order of the District Court for the Northern District of California remanding this case to the California state courts. Because I believe, for the reasons outlined below, that the order of the District Court is not subject to review, the application will be denied.

This state law antitrust action was originally brought by Charlene Rosack in the California Superior Court for San Mateo County seeking damages individually and on behalf of a class of persons who purchased new Volvo automobiles from California Volvo dealers during the years 1967-1976. Defendants removed the action to the Federal District Court pursuant to 28 U. S. C. § 1441 (a), alleging that the action was within the original diversity jurisdiction of this Court as prescribed in 28 U. S. C. § 1332. Plaintiff moved to remand the action to state court on the ground, *inter alia*, that the amount in controversy did not exceed $10,000 as required by § 1332. The District Court granted the motion. Its action was premised on the belief that the case "must be treated as a class action for the purpose of determining jurisdictional issues," whereas here "it appears that only a few mem-

bers of a class estimated to have some 50,000 members meet the jurisdictional requirement." The District Court accordingly held:

> "It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn*, all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U. S. C. § 1447 (c)."[1]

Applicant attacks this conclusion, contending that since the District Court specifically found that jurisdiction existed over "a few members of" the class, the court's order remanding the entire action was not authorized by 28 U. S. C. § 1447 (c). The flaw in this argument is that, while the District Court may have been wrong in its analysis, it clearly stated, citing to § 1447 (c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with § 1447 (c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of 28 U. S. C. § 1447 (d):

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

[1]The Ninth Circuit denied the petition for a Writ of Mandamus and/or Prohibition on November 11, 1976.

We held last Term in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336 (1976), where the District Court ordered a remand because of its crowded docket, that § 1447 (d) did not bar review of remand orders "issued on grounds not authorized by § 1447c," *id.,* at 343.[2] But the District Court here *did* base its order on § 1447(c). *Thermtron* is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court "does not have jurisdiction of this action," see 423 U. S., at 343-344. Applicant's position would mean that any allegedly erroneous application of § 1447 (c) would be reviewable by Writ of Mandamus, leaving the § 1447 (d) bar extant only in the case of allegedly proper applications of § 1447 (c); a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron.*[3]

[2]In *Thermtron,* the District Court acknowledged that the defendant had a "right" to remove the action, pursuant to 28 U. S. C. § 1441, but that this right had to be "balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action." *Id.,* at 340. As we noted, that order "was based on grounds wholly different from those upon which § 1447(c) permits remand." *Id.,* at 344.

[3]"It is unquestioned in this case and conceded by petitioner that this section prohibits review of all remand orders issued pursuant to § 1447(c) *whether erroneous or not.* . . . If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise." *Thermtron,* 423 U. S., at 343 (emphasis added).

Since I do not believe four Members of this Court would find the order of the District Court subject to review, the application for a stay is denied.

Order.

United States Court of Appeals, for the Ninth Circuit.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants-Appellants. No. 76-3296.

Filed: November 11, 1976.

Before: WRIGHT and KENNEDY, Circuit Judges.

Upon due consideration of the petition for writ of mandamus and the opposition thereto, the petition is denied. This dissolves this Court's order of October 28, 1976 staying the district court's order of remand to state court.

/s/ Eugene A. Wright
/s/ Anthony M. Kennedy

Order.

United States Court of Appeals, for the Ninth Circuit.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. Volvo of America Corporation; Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants-Appellants. No. 76-3296.

Filed: October 28, 1976.

Before: SNEED, Circuit Judge.

In order to allow a regular motions panel of this Court to consider the petition for writ of mandamus, the district court's order of October 20, 1976 is stayed until November 12, 1976, or until further order of this Court, whichever occurs first.

/s/ Joseph T. Sneed

Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to State Court.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, v. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. C-76-0742 WWS.

Filed: Oct. 20, 1976.

This state law antitrust action was originally brought in the California Superior Court for San Mateo County. The complaint seeks damages on behalf of a named plaintiff and a class of persons who purchased new Volvo automobiles from California Volvo dealers in the period between 1967 and 1976. The complaint alleges that defendants have engaged in an unlawful conspiracy to fix the resale price of new Volvo automobiles, parts and accessories and the resale profit on used automobiles sold by Volvo dealers contrary to the provisions of California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. The prayer for relief seeks treble damages and attorney's fees in accordance with § 16750 of that Act, but does not request damages in a specified amount. Named as defendants in the complaint are Volvo of America Corporation ("Volvo"), subsidiary and parent corporations of Volvo, and a series of Doe defendants who are identified only as parties owned, dominated and controlled by each other, and who are acting as agents for and conspiring with each other.

Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441(a), alleging that the action was

within the original diversity jurisdiction of this Court as prescribed in 28 U.S.C. § 1332.[1] Plaintiffs moved to remand the action to state court on the grounds that complete diversity of citizenship was lacking and that the amount in controversy did not exceed $10,000 as required by § 1332. The motion was referred to a United States Magistrate who recommended that the motion be denied. The relevant findings of the Magistrate were: (1) that since the Doe defendants could not be used to defeat diversity, complete diversity of citizenship was present among the parties; and (2) that since attorney's fees can be considered in determining the amount in controversy, more than $10,000 was in controversy among the parties. Plaintiffs now challenge these findings on appeal from the Magistrate's findings and recommendation.

I. DIVERSITY OF CITIZENSHIP.

Plaintiffs seek to defeat diversity by relying on the Doe defendants, who, they contend, are California citizens. The difficulty with this contention is that the complaint does not allege the Does' citizenship. The Does are identified in paragraph XII of the complaint as being owned, dominated, and controlled by other Does, and as agents for and conspirators with other Does. They are all alleged to be part of the combination and conspiracy described in the complaint, but are not referred to again in the remainder of the complaint. While the complaint does refer to conspiratorial activi-

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[1] 28 U.S.C. § 1332(a)(1) provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;".

ties of Volvo dealers, defined in paragraph XIII as being Volvo retail dealers in California, no Doe defendant is identified as a Volvo dealer. Without a proper allegation of the identity, status and citizenship of any Doe, plaintiffs' contention that there are Doe defendants who are California citizens and thus destroy diversity must be rejected. *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); see also 2A Moore's Federal Practice § 8.10 (2d ed. 1974). Accordingly, we adopt the Magistrate's finding on this issue.

II. AMOUNT IN CONTROVERSY.

Plaintiffs also challenge the Magistrate's finding that more than $10,000 is in controversy in this litigation. Plaintiffs brought this action as a class action in the state court. While the action has not yet been certified as a class action in this Court pursuant to Rule 23, Fed. R. Civ. P., it must be treated as a class action for the purpose of determining jurisdictional issues. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951-52 (9th Cir. 1972). Defendants have not argued that the class as pleaded by plaintiffs is a sham designed to defeat federal jurisdiction nor have they challenged the treatment of this action as a bona fide class action at this stage of the proceedings.

Plaintiff Rosack alleges that her claims "are typical of those to be asserted for the other members of the plaintiff class", that the "rights of plaintiff and the class members involve common questions of law and fact which predominate over any question affecting only individual members of the class," and that a class action is superior to other methods of adjudication

of the controversy. (Complaint para. VII and VIII.) Plaintiff individually and each member of the class seek treble damages, attorneys' fees and costs.

It is plain, therefore, that this is a class action falling within Rule 23(b)(3). The Supreme Court has held only recently that to meet the jurisdictional requirement in a Rule 23(b)(3) class action, each plaintiff's claim must satisfy the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In that case, the Supreme Court reaffirmed the historic rule that the "matter in controversy" requirement of Section 1332 must be satisfied by each member of the plaintiff class having a separate and distinct claim; plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims:

> "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that *any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*" 414 U.S. at 300 (emphasis supplied).

See, also, *Snyder v. Harris*, 394 U.S. 332 (1969), and *United States v. Southern Pacific Transportation*

Co., ... F.2d ....., Nos. 74-333 and 75-1080, filed September 10, 1976, at slip opinion p. 8, n. 11 (9th Cir. 1976).

The *Zahn* principle is settled beyond dispute. The questions that arise concern the manner of its application. In the usual case, *Zahn* would simply require that members of a class whose claims fall short of the jurisdictional requirement must be dismissed:

> "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in another's coattails. 469 F.2d at 1035.' " 414 U.S. at 301.

But in *Zahn* the Supreme Court upheld the dismissal of an entire Rule 23(b)(3) class action entered on a finding that "to a legal certainty" "not every individual owner in the class had suffered . . . damages in excess of $10,000." Thus, even though some of the class members had been able to meet the jurisdictional test, the District Court nonetheless dismissed the entire action on the ground that "it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim . . ." (414 U.S. at 292)

Here we are confronted with the application of *Zahn* in the context of a removed action. While plaintiffs have not alleged any specific amount of damage claimed in the complaint, they contend on this motion that the damage claims of the individual plaintiffs resulting from the alleged price fixing could not exceed "a few dollars" in the case of parts and a "few hundred dollars" in the case of automobiles. Defendants respond that some plaintiffs were multiple purchasers of Volvos

and their claims, if they had any, might therefore well exceed $10,000. Viewing the record on this motion in the light most favorable to defendants, it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement.[2]

That conclusion is not altered by the fact that attorneys' fees which may be awarded to prevailing plaintiffs may be taken into account. Cal. Bus. & Prof. Code, § 16750. See, *Missouri State Life Ins. Co. v. Jones,* 290 U.S. 199, 202 (1933); *Stokes v. Reeves,* 245 F.2d 700, 702 (9th Cir. 1937). Attorneys fees would be awarded as a part of the separate and distinct damage recovery of each plaintiff. It appears to the Court as a legal certainty that reasonable attorneys fees when added to the damages claimed by the bulk of the plaintiffs of "a few hundred dollars" each—even after trebling—would not result in individual claims in excess of $10,000. See, *Georgia Ass'n of Ind. Ins. Ag. Inc. v. Travelers Indem. Co.,* 341 F.Supp. 841, 843-844 (N.D. Ga. 1970).[3]

It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn,* all of those plaintiffs

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[2]The Court may look at the entire record to determine whether jurisdictional defects are cured. See Wright, Federal Courts (2d Ed. 1970) 291; *Lonnquist v. J. C. Penney Co.,* 421 F.2d 597, 599 (10th Cir. 1970).

[3]While the allocation of attorneys fees to each prevailing class member's recovery is undoubtedly sound, the result would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000.

would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. § 1447(c). See, *Kinsey v. General Motors Acceptance Corp.*, 359 F.Supp. 36 (D.N.D. 1973).[4]

Even if there were reason to doubt the correctness of this disposition, any doubt should be resolved in favor of remand to spare the parties proceedings which might later be nullified should jurisdiction be found to be lacking. See, *Williams v. Tri-County Community Center*, 232 F.Supp. 286, 288 (S.D. Miss. 1971), *Aff'd*, 452 F.2d 221 (5th Cir. 1971); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9, 12 (S.D.N.Y. 1975); *Fernandez v. Reynolds Metals Co.*, 384 F. Supp. 1281, 1283 (S.D. Tex. 1974); *Wood v. Home Insurance Co.*, 305 F.Supp. 937, 938 (C.D. Cal. 1969).

Accordingly, the Magistrate's recommendation of June 8, 1976, is hereby set aside and the action remanded to the Superior Court in and for San Mateo County, each party to bear its own costs.

IT IS SO ORDERED.

Dated: October 19, 1976.

/s/ William W. Schwarzer
William W. Schwarzer
United States District Judge

[4]28 U.S.C. § 1441(c) would permit, but not require, the Court to retain jurisdiction of claims properly removed when joined with claims not otherwise removable. That provision does not appear applicable to a class action and most likely does not contemplate the division of a single class of plaintiffs into remandable and non-remandable subclasses. Moreover, to apply it here to justify retention of jurisdiction would simply open the door to a subsequent and inevitable dismissal of the bulk of the class members for lack of jurisdiction on the motion of the very party that invoked the jurisdiction of this Court in the first place. We are confident that this is not the result contemplated by the authors of Section 1441(c).

Magistrate's Findings and Recommendations.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, et al, Defendants. No. C-76-742 OJC.

Lodged: 6-8-76.

Plaintiff has moved the Court for an Order to remand this case to the Superior Court for San Mateo County. Following oral argument and after considering the files and pleadings in the case, together with the memoranda of points and authorities, I find that:

(a) There is more than $10,000 in controversy in this litigation. Such a finding is based on the fact that attorney's fees can be considered in determining whether the requisite amount in controversy is present. (See cases cited in Defendant's Brief)

(b) With respect to diversity of citizenship, plaintiff's counsel during the course of oral argument conceded that when Volvo Western merged with Volvo of America Corporation the California corporation ceased to exist as a separate entity. Such is the import of California Corporations Code Section 4116, and is supported by the case of *Asher vs. Pacific Power & Light Co.*, 249 F.Supp. 671 (No. Dist. Cal. 1965); see also *Hoefferle Truck Sales vs. Divco-Wayne*, 523

F.2d 543 (7th Cir. 1975). This narrows the claim of lack of diversity to reliance on Doe Defendants as they appear in paragraph XII of the original complaint. The parties cite cases in their briefs to argue for their respective positions.

Quoting from Moore's Federal Practice Volume 2A, Page 1664, and cases cited therein:

"* * *

> Some plaintiffs have attempted to invoke diversity jurisdiction in cases where they have joined some unknown or fictitious persons as 'John Doe' defendants. Conceivably the joinder of an actual person as a 'John Doe' defendant may be justifiable under unusual circumstances. But certainly, as a general proposition, the practice, even though permitted under state law, is unwarranted in diversity cases brought originally in the federal courts, for at least the following reasons: the district courts are courts of limited jurisdiction; a plaintiff who invokes district court jurisdiction has the duty to aver the facts requisite to that jurisdiction; under general diversity principles, previously discussed, the citizenship of each plaintiff must be diverse from that of each defendant and plaintiff's averments must so show. This cannot be truthfully shown as to fictitious persons; and usually not as to an actual but unknown person for if, in truth, his citizenship can be affirmatively alleged his name can usually be ascertained. Sound authority supports the general proposition that the 'John Doe' practice is unwarranted in diversity cases; and the action is subject to dismissal unless the John Does are eliminated or their citizenship affirmatively alleged. Where, however, the John Does are dismissed and there is complete diversity between the remaining parties, the pleading defect has not been regarded as reversible error. (footnotes omitted)

* * *"

From the foregoing, I find that plaintiff cannot rely on the Doe Defendants to defeat diversity. The pleadings simply do not establish California defendants, leaving only the non-resident corporate defendant. Thus the diversity requisite to federal court jurisdiction appears to be the fact.

In view of the foregoing, I recommend that the Court enter its Order denying plaintiff's motion to remand the case to the State Court.

Dated: June 8, 1976.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

IT IS SO ORDERED.

Dated:

United States District Judge

Petition for Writ of Mandamus and/or Petition for Writ of Prohibition.

United States Court of Appeals, for the Ninth Circuit.

Volvo of America Corporation, Petitioner, vs. The Honorable William W. Schwarzer, Judge, United States District Court for the Northern District of California, Respondent. Charlene P. Rosick, individually and on behalf of all others similarly situated, Real Party in Interest. No. 76-3296.

Filed: October 28, 1976.

Pursuant to 28 U.S.C. § 1651 and Rule 21, Federal Rules of Appellate Procedure, petitioner VOLVO OF AMERICA CORPORATION hereby requests this Court to issue a writ of mandamus and/or writ of prohibition directed to respondent, The Honorable WILLIAM W. SCHWARZER, Judge, United States District Court for the Northern District of California, commanding respondent to set aside the order of remand and retain jurisdiction of civil action No. 76-742-WWS in the United States District Court for the Northern District of California.

I

PRELIMINARY STATEMENT

1. This case involves an action originally brought in state court, alleging violations of the California antitrust laws. Petitioner removed on the basis of diversity jurisdiction.

2. Petitioner contends that respondent's order of remand was an act in excess of the district court's jurisdiction in that it was not authorized by 28 U.S.C. 1447(c). Petitioner believes that its right to litigate

this case in federal court has wrongfully, erroneously and without proper authority been deprived by respondent. Under the recent Supreme Court decision on *Thermtron Products, Inc. v. Hermansdorfer*, ... U.S. ...., 46 L. Ed.2d 542 (1976), respondent's wrongful denial of federal jurisdiction is reversable by this court by writ of mandate.

II

STATEMENT OF FACTS

1. On March 12, 1976, an action was commenced by Charlene P. Rosack, individually and on behalf of all others similarly situated, plaintiffs, against Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc. and Does I through L, defendants, in the Superior Court of the State of California, County of San Mateo, alleging violations of the California antitrust statutes. A copy of the original complaint is attached hereto as Exhibit "A" and made a part hereof.

2. The summons and complaint were served on defendant Volvo of America Corporation (hereinafter Volvo) on March 31, 1976. No other defendants have been served.

3. On April 14, 1976, Volvo filed a petition and bond for removal in the United States District Court for the Northern District of California, removing said action to said court. A copy of the petition for removal is attached hereto as Exhibit "B" and made a part hereof.

4. On April 30, 1976, plaintiffs filed a notice of motion and motion to remand the action to state court.

5. The motion for remand was referred to the Honorable Owen E. Woodruff, Jr., United States Magistrate, for hearing and decision. On June 8, 1976, the Magistrate submitted his findings and recommendations, in which he concluded that "There is more then $10,000 in controversy in this litigation" and that "The diversity requisite to federal court jurisdiction appears to be the fact." The Magistrate's findings and recommendations are attached hereto as Exhibit "C" and made a part hereof.

6. Following the Magistrate's ruling, Volvo on June 14, 1976 filed its answer and affirmative defenses.

7. On or about June 12, 1976, plaintiffs, pursuant to Local Rule 505 of the Northern District of California filed a notice of objections to the Magistrate's findings and recommendations. Plaintiffs contended that neither the requisite diversity nor amount in controversy were present. Numerous briefs have been filed by both sides on the issues presented by the motion to remand, and petitioner will not burden this Court by attaching copies of all these briefs.

8. On October 20, 1976, the respondent entered an order setting aside the Magistrate's findings and recommendations and remanding the action to state court. A copy of said order is attached hereto as Exhibit "D" and made a part hereof. In subsequent proceedings, the effective date of this order was stayed by respondent until 4:30 p.m. on October 29, 1976. The express purpose of the stay was to afford petitioner an opportunity to seek relief from this Court.

9. Plaintiff's complaint alleges that the defendants, including petitioner, have engaged in an international combination and conspiracy to fix the prices of new

Volvo automobiles, parts and accessories offered for sale in the State of California from January, 1967 until the date of filing of the complaint. Plaintiffs also allege that defendants acted in restraint of trade through the use of tying arrangements in connection with the sale of parts and accessories for Volvo automobiles. Plaintiff Charlene P. Rosack purports to represent a class of all retail purchasers of Volvos in California during the period in controversy. Plaintiffs seek actual damages, treble damages and attorneys' fees, pursuant to *California Business and Professions Code* § 16750. No action has been stated under the federal antitrust laws.

10. Petitioner, the only defendant that has been served, has denied the allegations.

11. In the original motion for remand, plaintiff advanced several theories as basis for her contention that requisite diversity was not present. Plaintiff claimed that the existence of the Doe defendants could be relied on to defeat diversity, and the fact that defendant Volvo Western Distributing, Inc. had been a California corporation defeated diversity jurisdiction. However, the Magistrate and the respondent both clearly found that the Doe defendants could not be relied upon to defeat federal jurisdiction, and that since Volvo Western distributing, Inc. had ceased to exist as a separate corporate entity prior to the filing of complaint, there was complete diversity between plaintiffs and defendants.

12. The primary issue in the remand proceedings, and the only issue still in contention between the parties, is whether or not the jurisdictional amount in controversy is present. *The respondent in his order of remand, found that at least several plaintiffs, possibly including*

the named plaintiff, met the amount in controversy requirement by having potential claims against defendant in excess of $10,000. However, notwithstanding that finding, respondent ordered the entire action remanded to state court.

III

STATEMENT OF ISSUES PRESENTED

A. DOES 28 U.S.C. § 1447(c) PERMIT REMAND OF AN ACTION IN WHICH COMPLETE DIVERSITY EXISTS, AND WHERE THE DISTRICT COURT HAS FOUND THAT FEDERAL JURISDICTION EXISTS AS TO SOME OF THE PLAINTIFFS?

B. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT COURT, UNDER 28 U.S.C. § 1332, WHERE THERE IS COMPLETE DIVERSITY AND SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, DOES THE DISTRICT COURT HAVE AUTHORITY TO REMAND THE ENTIRE ACTION TO STATE COURT?

C. UNDER 28 U.S.C. § 1447(c), DOES THE DISTRICT COURT HAVE DISCRETION TO REMAND AN ENTIRE CLASS ACTION CASE TO STATE COURT NOTWITHSTANDING A FINDING BY THE COURT THAT AT LEAST SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT?

D. DOES 28 U.S.C. § 1441(c) REQUIRE THE DISTRICT COURT TO RETAIN JURISDICTION OF CLAIMS PROPERLY REMOVED WHEN JOINED WITH CLAIMS NOT OTHERWISE REMOVABLE?

E. WHERE FEDERAL JURISDICTION EXISTS AS TO CERTAIN MEMBERS OF A CLASS, CAN THE COURT REMAND TO STATE COURT THE CLAIMS OF THOSE CLASS MEMBERS OVER WHICH THE COURT HAS JURISDICTION ALONG WITH THE CLAIMS OF CLASS MEMBERS OVER WHOM THE COURT HAS NO JURISDICTION?

F. IN A CLASS ACTION WHERE PLAINTIFFS CLAIM ATTORNEYS FEES PURSUANT TO STATE STATUTE AS AN ELEMENT OF DAMAGES, DOES THE POTENTIAL AWARD OF ATTORNEYS' FEES CREATE A "COMMON FUND" SO THAT AGGREGATION OF SUCH FEES IS PERMISSIBLE IN DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION?

G. IN A CLASS ACTION WHERE PLAINTIFFS CLAIM TREBLE DAMAGES PURSUANT TO A STATE STATUTE AS AN ELEMENT OF DAMAGES, DOES THE POTENTIAL AWARD OF TREBLE DAMAGES CREATE A "COMMON FUND" SO THAT AGGREGATION OF SUCH DAMAGES IS PERMISSIBLE IN DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION?

H. FOR PURPOSES OF DETERMINING THE EXISTENCE OF FEDERAL JURISDICTION, SHOULD AN ACTION BROUGHT BY

A PLAINTIFF "INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED" BE TREATED SOLELY AS A CLASS ACTION PRIOR TO THE DETERMINATION OF THE EXISTENCE OF ANY CLASS PURSUANT TO RULE 23, FEDERAL RULES OF CIVIL PROCEDURE?

I. IF THE DISTRICT COURT ASSUMES JURISDICTION OVER CERTAIN CLASS MEMBERS WHO, IN A DIVERSITY CASE, CAN STATE CLAIMS FOR AN AMOUNT IN CONTROVERSY EXCEEDING $10,000, DOES THE DISTRICT COURT AUTOMATICALLY, OR MAY THE DISTRICT COURT IN ITS DISCRETION, ASSUME ANCILLARY JURISDICTION OVER THE CLAIMS OF THE REMAINING CLASS MEMBERS WHO CANNOT STATE A CLAIM FOR AN AMOUNT IN CONTROVERSY IN EXCESS OF $10,000?

J. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT COURT UNDER 28 U.S.C. 1332, WHERE SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, AND DIVERSITY EXISTS, CAN THE DISTRICT COURT REMAND TO STATE COURT THE CLAIMS OF THOSE PLAINTIFFS WITH A CLAIM FOR AN AMOUNT IN CONTROVERSY IN EXCESS OF $10,000?

K. IN AN ACTION REMOVED FROM STATE COURT PURSUANT TO THE ORIGINAL JURISDICTION OF THE DISTRICT

COURT UNDER 28 U.S.C. 1332, WHERE SOME PLAINTIFFS HAVE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT, CAN THE DISTRICT COURT REMAND TO THE STATE COURT THE CLAIMS OF SAID PLAINTIFFS ON THE SOLE GROUND THAT SAID CLAIMS HAVE BEEN JOINED IN A PURPORTED CLASS ACTION WHERE THE REMAINDER OF THE PURPORTED CLASS MEMBERS CANNOT STATE CLAIMS IN EXCESS OF THE JURISDICTIONAL AMOUNT IN CONTROVERSY?

IV
RELIEF SOUGHT

Petitioner seeks a writ of mandamus or in the alternative a writ of prohibition commanding respondent to set side the order of remand entered on October 20, 1976 in civil action No. 76-742-WWS, entitled Charlene P. Rosack, individually and on behalf of all others similarly situated, plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, defendants, and further commanding respondent to retain jurisdiction of said case, and further prohibiting respondent from remanding said case to the state court. Petitioner has also filed concurrently herewith an emergency motion for a stay of said remand order pending the decision by this Court on petitioner's application for said writs.

V

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

A. THIS COURT HAS AUTHORITY, BY WRIT OF MANDAMUS, TO REVIEW THE REMAND ORDER ENTERED BY THE DISTRICT COURT.

The Supreme Court of the United States has recently held that an order of remand entered by a district court on grounds not authorized by 28 U.S.C. § 1447 (c) is subject to review by writ of mandate.

Thermtron Products, Inc. v. Hermansdorfer, ... U.S. ....., 46 L. Ed.2d 542 (1976).

In *Thermtron,* the district court remanded a case on grounds other than those authorized by 28 U.S.C. § 1447(c). Section 1447(c) authorizes remand only where a case is removed "improvidently and without jurisdiction." The district court in *Thermtron* found that federal jurisdiction over the case existed, but remanded the case to state court because of the federal court's crowded docket. The defendant sought a writ of mandate from the Sixth Circuit Court of Appeals. The application for writ was denied on the grounds that 28 U.S.C. 1447 (d) precluded review of any order of remand.

The Supreme Court, however, held that the bar against review in Section 1447(d) is applicable only to remand orders properly issued on grounds authorized by 1447(c):

> "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and section 1447(c) must be construed together, as this court has said of the predecessors to these two sections in *Employers Reinsurance Corp. v. Bryant,* 299 U.S. 374, 380-381, 81 L. Ed. 289, 57 S. Ct. 273 (1937), and *Kloeb v. Armour & Company,* 311 U.S. 199, 202, 85 L. Ed. 124, 61 S. Ct. 213 (1940). These provisions, like their predecessors, 'are *in pari materia* [and] are to be construed accordingly rather than as distinct enactments . . .' *Employers Reinsurance Corp. v. Bryant,* supra, at 380, 81 L. Ed. 289, 57 S. Ct. 273. *This means that only remand orders issued under 1447(c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under section 1447(d).*" (emphasis added).

Thermtron Products, Inc. v. Hermansdorfer, 46 L. Ed.2d at 551.

The remand order issued by respondent herein clearly shows that respondent found that jurisdiction existed as to at least several plaintiffs. Therefore, the remand of the entire action was improper and based on grounds not authorized by section 1447(c).

B. WHERE FEDERAL JURISDICTION EXISTS AS TO SOME PLAINTIFFS IN A PURPORTED CLASS ACTION DISMISSAL OR REMAND OF THE ENTIRE ACTION IS IMPROPER.

The Supreme Court has held that in cases where only one plaintiff meets the jurisdictional requirements for federal court, that plaintiff's claim is properly before the court, and the claims of other plaintiffs who do

not meet the jurisdictional requirement should be dismissed. In *Zahn v. International Paper Company,* 414 U.S. 291, 38 L. Ed.2d 511 (1973), the named plaintiffs in a purported class action each had claims satisfying the $10,000 requirement. However, they sought to represent a class where unnamed plaintiffs would not have sufficient claims. The issue presented was not whether the entire case should be dismissed for lack of federal jurisdiction, but only whether the suit should proceed as a class action. The Supreme Court held that the claims of the unnamed plaintiffs could not be aggregated with the claims of the named plaintiffs and therefore affirmed the lower court's ruling denying class certification. *However, it is clear that federal jurisdiction still existed as to those plaintiffs who had claims in excess of $10,000:*

> "As previously indicated, *Snyder* invoked the well established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim was to survive a motion to dismiss. This rule clearly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 *but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*
>
> "This follows inescapably from the court's heavy reliance on *Clark v. Paul Gray, Inc.,* supra, where only one of several plaintiffs had a sufficiently large claim *and all other plaintiffs were dismissed from the suit.* Moreover the court cited with approval the decision in *Alvarez v. Pan American Life Insurance Company,* 375 F.2d 992 (C.A.5), *cert. den.,* 389 U.S. 827, 19 L. Ed.2d 82, 88 S. Ct. 74 (1967), which was decided after the 1966 amendments to rule 23 and which involved a class action with only one member of the class having a claim sufficient to satisfy section 1332. *Only that claim was held within the jurisdiction of the district court.*" (emphasis added).

Zahn v. International Paper Company, supra, 414 U.S. at 300, 301, 38 L. Ed.2d at 518, 519.

The result in *Zahn* was that the lower court struck all references in the complaint to persons other than the four plaintiffs who met the jurisdictional requirement. (*Zahn v. International Paper Company,* 469 F.2d 1033, 1034 (C.A.2, 1972).) Thus, it is clear that the district court found, and the Supreme Court implicitly upheld the determination that the district court had original jurisdiction over those plaintiffs with claims in excess of $10,000.

In the present case, the district court made the finding that several plaintiffs had claims in excess of $10,000. Further, the court never specifically found that the named plaintiff, Charlene Rosack, did not have a claim in excess of $10,000. As reflected in the court's remand order, page 6, footnote 3, "The result [remand] would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000."

The sole ground for the respondent's remand order was that a majority of the purported class plaintiffs would not have claims in excess of $10,000. However,

28 U.S.C. 1447(c) does not authorize such a ground for an order of remand. In essence, the respondent has allowed extraneous factors, such as expedition of the Rule 23 class action, to defeat federal jurisdiction which had properly attached upon removal.

Zahn clearly established that in a case where some plaintiffs meet the jurisdictional requirement, federal jurisdiction is present, at least as to those plaintiffs. Can this jurisdiction be defeated by the procedural device of a class action? *It must be remembered that a class action is merely a procedural device for the efficient and economical litigation of numerous individual action.* That principle is implicit in the court's rule in *Zahn* which require each plaintiff to satisfy the jurisdictional amount requirement.

The issue presented can be made clearer through an example. Suppose that Prestige Optics, which was shown in petitioner's affidavits in the district court to have purchased ten new Volvos in the period in controversy, had brought an individual action against Volvo making allegations identical to those in the instant case. Petitioner would clearly have had the right to remove such an action to federal court. The situation would be similar for the other multiple purchasers of Volvos. However, because the potential claim of Prestige Optics has been joined by plaintiff in her class action with claims not meeting the jurisdictional requirements, petitioner, under the respondent's ruling, would be deprived of its right to litigate in federal court. Thus, petitioner may be substantially prejudiced by plaintiff's use of the class action procedure. Such a result is not contemplated under the terms of 28 U.S.C. 1447(c).

C. PETITIONER HAD A RIGHT TO REMOVE THIS CASE TO FEDERAL COURT, AND WILL BE SUBSTANTIALLY PREJUDICED AND IRREPARABLY INJURED IF THAT RIGHT IS DEFEATED BY AN IMPROPER REMAND ORDER.

Congress has established the policy, through 28 U.S.C. 1441 that in any action over which the district court would have original jurisdiction, a defendant has a right to have his case litigated in federal court. This right is equal to the right of plaintiffs to make the initial choice of which forum in which to bring the action:

> "While the plaintiffs had a right to chose initially the state court as the forum for this action, the defendants have a subsequent equal right to resort herein to the federal court by compliance with the removal statute, transferring indirectly original jurisdiction from the state to the federal court."
>
> *Garland v. Humble Oil & Refining Company,* 306 F. Supp. 608, 610 (E.D. Tenn. 1969).

In *Gentle v. Lamb-Weston, Inc.,* 302 F. Supp. 161, 165, (N.D. Maine 1969), the court stated:

> "While the plaintiff, in good faith, may proceed in the state courts . . . it is equally true that the federal courts should not . . . prevent a removal to a federal court where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts in proper cases to retain their own jurisdiction."

Respondent's remand order will deprive petitioner of its right to litigate in federal court. The instant

case involves numerous questions of antitrust law, and although brought under the California antitrust statute, federal antitrust decisions and authority will be controlling. (See *Chicago Title Insurance v. Great Western Financial Corp.*, 69 C.2d 305, 70 Cal. Rptr. 849 (1968).) Petitioner, a foreign corporation, would be faced with a situation of litigating complex questions of antitrust law in a state court.

VI
CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court grant petitioner's application for writ of mandamus and/or prohibition.

Respectfully submitted,

PAUL, HASTINGS & JANOFSKY
/s/ By Robert S. Span
ROBERT S. SPAN
Attorneys for Petitioner
Volvo of America Corporation

Class Action Complaint for Damages.

(Cartwright Act, Bus. & Prof. Code § 16700 et seq.)

Superior Court of the State of California, County of San Mateo.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. 200471.

Filed: March 12, 1976.

Plaintiffs allege:

FIRST CAUSE OF ACTION

I

Plaintiff, CHARLENE P. ROSACK, is, and at all times material herein was, a resident of the State of California, County of San Francisco.

II

Plaintiff, CHARLENE P. ROSACK, purchased a new Volvo automobile at retail from a Volvo dealer located in the State of California in August of 1972.

III

Plaintiff, CHARLENE P. ROSACK, brings this action on behalf of herself and all other persons, natural or legal, who purchased a new Volvo automobile at retail from a Volvo dealer located in the State of California during the period in controversy.

IV

Plaintiffs had no knowledge of the combination and conspiracy alleged herein, or of any facts which might have led to the discovery thereof, prior to the last year.

V

Plaintiff and the members of the plaintiff class could not have discovered the conspiracy at an earlier date by the exercise of due diligence because of deceptive practices and techniques of secrecy employed by defendants AKTIEBOLAGET VOLVO, VOLVO OF AMERICA CORPORATION and VOLVO WESTERN DISTRIBUTING, INC. to avoid detection and fraudulently to conceal such combination and conspiracy.

VI

Plaintiff, CHARLENE P. ROSACK, is in a position similar to that of other members of the plaintiff class, which is so numerous that joinder of all parties is impracticable.

VII

The rights of plaintiff and the class members involve common questions of law and fact which predominate over any questions affecting only individual members of the class; and this class action is superior to other methods for the fair and efficient adjudication of the controversy herein described.

VIII

The claims of plaintiff are typical of those to be asserted for the other members of the plaintiff class, and said plaintiff will fairly and adequately protect the interests of the class. Individual actions by class members are not feasible since the average claim for each class member would not be in an amount sufficient to justify individual prosecution.

IX

AKTIEBOLAGET VOLVO (hereinafter referred to as "A B Volvo"), Gothenburg, Sweden, is made a

defendant herein. A B Volvo is an alien corporation. During the period in controversy and continuing thereafter to and including the date of filing of this complaint, A B Volvo was the parent company and owner of 100% of the capital stock of, and dominated and controlled the operations, management and policies of, defendants VOLVO OF AMERICA CORPORATION and VOLVO WESTERN DISTRIBUTING, INC. In addition, A B Volvo manufactures the Volvo automobiles sold and distributed by other defendants.

X

VOLVO OF AMERICA CORPORATION (hereafter referred to as "Volvo of America") is made a defendant herein. Volvo of America is a corporation organized and existing under the laws of the State of Delaware, with its national headquarters in Rockleigh, New Jersey. Volvo of America is, and at all times material hereto was, licensed to do and doing business in California, and in San Mateo County. During the period in controversy and continuing thereafter to and including the date of filing of this complaint, Volvo of America was wholly owned by A B Volvo and was not an independent subsidiary. A B Volvo dominated and controlled the operations, management and policies of Volvo of America. Volvo of America is and at all times material hereto was the importer and national distributor of Volvo automobiles, parts and accessories in the United States. Volvo of America sells Volvo automobiles, parts and accessories to regional distributors for resale in all 50 states, including the State of California.

XI

VOLVO WESTERN DISTRIBUTING, INC., (hereinafter "VWD") is made a defendant herein. VWD was a corporation organized and existing under the laws of the State of California with its principal place of business in the State of California and regional offices in San Mateo County; and at all times material herein maintained and conducted a substantial amount of business in San Mateo County. From at least January, 1967, and continuing thereafter to and including the date of filing of this complaint, VWD was a wholly owned subsidiary of Volvo of America, which, with A B Volvo, dominated and controlled the operations, management and policies of VWD. VWD at all times material hereto was the distributor of Volvo automobiles, parts and accessories in the "Western Region" of the United States comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah and Washington. VWD purchases Volvo automobiles, parts and accessories for resale from Volvo of America.

XII

The true names or capacities, whether individual, corporate, associate or otherwise, of the defendants DOES I through L are unknown to plaintiffs who therefore sue them by such fictitious names, and plaintiffs will amend this complaint to show their true names and capacities when they have been ascertained. Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is indebted to plaintiffs as hereinafter alleged, and that DOES I through V were owned, dominated and controlled by DOES VI through X; DOES XI through XV acted as agents for and in conspiring with DOES

XVI through XX; and that all of them were part of the combination and conspiracy hereinafter alleged.

XIII

Defendant A B Volvo manufactures Volvo automobiles, parts and accessories therefor, in Sweden, The exclusive importer for said Volvo automobiles, parts and accessories is defendant Volvo of America Corporation. Defendant Volvo of America Corporation in turn distributes and sells the imported Volvo automobiles, parts and accessories to various wholly owned regional distributing corporations. VWD is the wholly owned regional distributor for the "Western Region" of the United States, including California. VWD sells Volvo automobiles, parts and accessories to retail Volvo dealers in California, for retail sale by such dealers to the consuming public of which the plaintiff, and the class represented by plaintiff, are members. (All references to "Volvo dealers" shall hereinafter mean retail Volvo dealers in California unless the context dictates otherwise.)

XIV

Beginning at least as early as January, 1967, and continuing thereafter until the filing date of this complaint, defendants A B Volvo, Volvo of America and VWD in combination with the Volvo dealers have engaged in unlawful combination and conspiracy to establish, maintain, control, fix, peg and stabilize the resale price of new Volvo automobiles, parts and accessories, and the resale profit on used automobiles, sold by Volvo dealers in violation of the Cartwright Act (Bus. & Prof. Code § 16700 et seq.).

XV

The aforesaid combination and conspiracy consisted of a continuing agreement and concert of action among defendants A B Volvo, Volvo of America and VWD, together with the Volvo dealers, the substantial terms of which were that said defendants, and each of them, would, by devices and practices, require, ensure and maintain compliance by and cooperation of Volvo dealers with including, but not limited to, the following practices:

(a) Volvo dealers would sell and advertise for sale Volvo automobiles, parts and accessories at prices fixed by defendants A B Volvo, Volvo of America and VWD, and each of them;

(b) Volvo dealers would only advertise the suggested retail prices fixed by defendants when prices were included in dealer advertisements for new Volvos;

(c) Volvo dealers would refrain from selling to or through automobile brokers or discount houses; and

(d) Volvo dealers would refrain from selling, advertising, and otherwise soliciting customers for Volvo automobiles outside the respective marketing areas of said dealers as designated by defendants A B Volvo, Volvo of America and VWD, and each of them.

XVI

The unlawful combination and conspiracy hereinbefore alleged has had the following effects, among others:

(a) Volvo dealer prices of Volvo automobiles, parts and accessories have been established, controlled, fixed, maintained, pegged and stabilized at noncompetitive and artificial levels;

(b) Price competition among Volvo dealers in the sale and distribution of Volvo automobiles, parts and accessories has been suppressed and eliminated;

(c) Consumers have been deprived of the opportunity of buying Volvo automobiles, parts and accessories manufactured and/or distributed by defendants A B Volvo, Volvo of America and VWD at competitive prices;

(d) Automobile brokers and discount houses have been generally unable to purchase Volvo automobiles, parts and accessories;

(e) Volvo dealers have been prevented from selling Volvo automobiles, parts and accessories at prices, to purchasers, and into territories, of their own choice; and

(f) Competition generally in the sale of Volvo automobiles, parts and accessories has been restrained, restricted, suppressed, limited, controlled, prevented, and eliminated.

XVII

As a direct result of the unlawful conduct of defendants A B Volvo, Volvo of America and VWD in combination with the Volvo dealers alleged herein, plaintiff and other members of the plaintiff's class have been unable to purchase at retail new Volvo automobiles, parts and accessories at prices determined by free and open competition, and, at all times material herein, the retail prices of new Volvo automobiles, parts and accessories purchased by plaintiff and other members of plaintiff's class were higher than they would have been absent the unlawful acts, combination and conspiracy herein alleged.

XVIII

Plaintiff, and other members of plaintiff's class, have been injured in their business and property by reason of these violations in an amount presently unknown. Plaintiffs pray leave to amend according to proof.

WHEREFORE, plaintiff, individually, and each and every member of the plaintiff class, prays judgment against defendants, and each of them, as hereinafter set forth.

SECOND CAUSE OF ACTION

I

Plaintiffs hereby incorporate and reallege Paragraphs I through XVIII of the First Cause of Action.

II

Defendants A B Volvo, Volvo of America and VWD, and each of them, in combination with Volvo dealers further acted in restraint of trade through tying arrangements, requiring Volvo dealers to purchase parts and accessories for Volvo automobiles from these defendants thereby preventing competition in manufacturing, marketing, transportation, sale or purchase of said parts and accessories.

III

Plaintiff, and members of plaintiff's class, were thereby required to buy Volvo parts and accessories as a condition of buying Volvo automobiles. Defendants A B Volvo, Volvo of America, VWD, and each of them, combined and conspired by continuing agreement and concert of action to sell to plaintiff, and members of plaintiff's class, only those parts and accessories provided by these defendants, and at resale prices established, controlled, fixed, maintained, pegged and stabilized by them.

IV

The unlawful combination and conspiracy hereinbefore alleged has had the following effects, among others:

(a) Volvo dealer retail prices of parts and accessories for Volvo automobiles have been fixed, maintained, pegged and stabilized at noncompetitive and artificial levels;

(b) Price competition among Volvo dealers in the sale of parts and accessories for Volvo automobiles has been suppressed and eliminated;

(c) Plaintiffs have been deprived of the choice of competing products suitable for Volvo automobiles manufactured and distributed by others, and the beneficial impact upon price inherent in increased competition; and

(d) Competition generally in the sale of parts and accessories for Volvo automobiles has been restrained, restricted, suppressed, limited, controlled, prevented and eliminated.

V

Plaintiff, and other members of plaintiff's class, have been injured in their business and property by reason of these violations in an amount presently unknown. Plaintiffs pray leave to amend according to proof.

WHEREFORE, plaintiff, individually, and each and every member of the plaintiff class, pray judgment against defendants, and each of them, in accordance with the provisions of Section 16750 of the Business and Professions Code, as follows:

1. For three times the damages sustained;
2. For reasonable attorney's fees;
3. For costs of suit incurred herein; and

4. For such other and further relief as the Court deems just and proper.

DATED: March 10, 1976.

COTCHETT, HUTCHINSON & DYER
BROWN, WRIGHT & KAUFMAN
CARTWRIGHT, SAROYAN, MARTIN & SUCHERMAN
/s/ By Harold C. Wright
HAROLD C. WRIGHT
Attorneys for Plaintiffs

VERIFICATION

I am an attorney at law admitted to practice before all courts of the State of California and have my office in Santa Clara County, California, and am one of the attorneys for the plaintiff in the above entitled action; that plaintiff is unable to make the verification because plaintiffs are absent from said county and for that reason affiant makes this verification on plaintiff's behalf; that I have read the foregoing CLASS ACTION COMPLAINT FOR DAMAGES and am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on March 10, 1976, at San Mateo, California.

/s/ Harold C. Wright
HAROLD C. WRIGHT

Notice of Filing of Petition and Bond for Removal.

United States District Court, Northern District of California.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. Case No. C76 742 OJC.

Filed: April 14, 1976.

TO PLAINTIFF AND TO HER ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 14, 1976, a Petition and Bond for Removal, true copies of which are attached to the copy of this Notice served upon you, were filed in the United States District Court for the Northern District of California.

Dated: April 14, 1976.

PAUL, HASTINGS & JANOFSKY
DAVID B. HARRIMAN
/s/ By David B. Harriman
Attorneys for Petitioner and Defendant, Volvo of America Corporation

Petition for Removal of Civil Action.

United States District Court, Northern District of California.

Charlene P. Rosack, individually, and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. Anti-trust Case No. C76-742 OJC.

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

The petition for removal of this suit from the Superior Court of the State of California for the County of San Mateo to the United States District Court for the Northern District of California, respectfully shows to this honorable Court:

1. This suit is one which may be removed to this Court by petitioner herein since the action is one in which this Court has original jurisdiction pursuant to Title 28, U.S. Code Section 1332, as it is a civil action wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states. Accordingly, by virtue of provisions of Title 28, U.S. Code Section 1441(a), this action may be removed to this Court.

2. Petitioner is the sole defendant served in a civil action brought against it in the Superior Court of the State of California for the County of San Mateo entitled Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, Aktiebolaget Volvo,

Volvo Western Distributing, Inc., and Does I through L, Defendants, San Mateo Superior Court Case No. 200471.

3. The summons and complaint in the aforesaid action was served on petitioner Volvo of America Corporation's authorized agent for service on March 31, 1976. A purported service of process was attempted on petitioner on March 15, 1976, which service has been challenged by petitioner on a motion to quash in the Superior Court for the County of San Mateo. No summons or complaint have been served on defendants Volvo Western Distributing, Inc. or Aktiebolaget Volvo. Defendants Does I through L are fictitious defendants. Attached hereto are copies of all pleadings and orders purportedly served on petitioner in said action.

4. At the time this suit was commenced, plaintiff was a resident of the State of California.

5. At the time this suit was commenced, petitioner was and still is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located in the State of New Jersey. Defendant Aktiebolaget Volvo was and still is an alien corporation located in Gothenburg, Sweden. Defendant Volvo Western Distributing, Inc. ceased to exist as a separate corporate entity and was dissolved on December 31, 1975.

6. None of the defendants is a citizen of the State of California.

7. This petition is filed within thirty days after service of the summons and complaint on petitioner herein. The time for filing this petition under the statutes of the United States has not expired.

8. Petitioner files and presents herewith a bond with good and sufficient surety in the sum of $250.00

as provided by Title 28, U.S. Code Section 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought should it be determined that this suit is not removable or is improperly removed.

WHEREFORE, petitioner prays that said action No. 200471 be removed from the Superior Court of the State of California for the County of San Mateo to this Court.

Dated: April 13, 1976.

PAUL, HASTINGS & JANOFSKY
DAVID B. HARRIMAN
/s/ By David B. Harriman
David B. Harriman
Attorneys for Petitioner
Volvo of America Corporation

VERIFICATION

State of California, County of Los Angeles—ss

DAVID B. HARRIMAN, being first duly sworn, deposes and says that he is one of the attorneys for petitioner herein, that he has read the foregoing Petition for Removal and he is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true.

Subscribed and sworn to before me on April 13, 1976.

/s/ David B. Harriman
David B. Harriman

/s/ Roslyn E. Klaus
Notary Public in and for said
County and State

Magistrate's Findings and Recommendations.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, vs. Volvo of America Corporation, et al, Defendants. No. C-76-742 OJC.

Plaintiff has moved the Court for an Order to remand this case to the Superior Court for San Mateo County. Following oral argument and after considering the files and pleadings in the case, together with the memoranda of points and authorities, I find that:

(a) There is more than $10,000 in controversy in this litigation. Such a finding is based on the fact that attorney's fees can be considered in determining whether the requisite amount in controversy is present. (See cases cited in Defendant's Brief)

(b) With respect to diversity of citizenship, plaintiff's counsel during the course of oral argument conceded that when Volvo Western merged with Volvo of America Corporation the California corporation ceased to exist as a separate entity. Such is the import of California Corporations Code Section 4116, and is supported by the case of *Asher vs. Pacific Power & Light Co.*, 249 F.Supp. 671 (No. Dist. Cal. 1965); see also *Hoefferle Truck Sales vs. Divco-Wayne*, 523 F.2d 543 (7th Cir. 1975). This narrows the claim of lack of diversity to reliance on Doe Defendants as they appear in paragraph XII of the original complaint. The parties cite cases in their briefs to argue for their respective positions.

Quoting from Moore's Federal Practice Volume 2A, Page 1664, and cases cited therein:

"* * *

Some plaintiffs have attempted to invoke diversity jurisdiction in cases where they have joined some unknown or fictitious persons as 'John Doe' defendants. Conceivably the joinder of an actual person as a 'John Doe' defendant may be justifiable under unusual circumstances. But certainly, as a general proposition, the practice, even though permitted under state law, is unwarranted in diversity cases brought originally in the federal courts, for at least the following reasons: the district courts are courts of limited jurisdiction; a plaintiff who invokes district court jurisdiction has the duty to aver the facts requisite to that jurisdiction; under general diversity principles, previously discussed, the citizenship of each plaintiff must be diverse from that of each defendant and plaintiff's averments must so show. This cannot be truthfully shown as to fictitious persons; and usually not as to an actual but unknown person for if, in truth, his citizenship can be affirmatively alleged his name can usually be ascertained. Sound authority supports the general proposition that the 'John Doe' practice is unwarranted in diversity cases and the action is subject to dismissal unless the John Does are eliminated or their citizenship affirmatively alleged. Where, however, the John Does are dismissed and there is complete diversity between the remaining parties, the pleading defect has not been regarded as reversible error. (footnotes omitted)

* * *"

From the foregoing, I find that plaintiff cannot rely on the Doe Defendants to defeat diversity. The pleadings simply do not establish California defendants, leaving only the non-resident corporate defendant. Thus the diversity requisite to federal court jurisdiction appears to be the fact.

In view of the foregoing, I recommend that the Court enter its Order denying plaintiff's motion to remand the case to the State Court.

Dated: June 8, 1976.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

IT IS SO ORDERED.

Dated: .....

United States District Judge

Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to State Court.

United States District Court, Northern District of California.

Charlene P. Rosack, individually and on behalf of all others similarly situated, Plaintiffs, v. Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L, Defendants. No. C-76-0742 WWS.

Filed: Oct. 20, 1976.

This state law antitrust action was originally brought in the California Superior Court for San Mateo County. The complaint seeks damages on behalf of a named plaintiff and a class of persons who purchased new Volvo automobiles from California Volvo dealers in the period between 1967 and 1976. The complaint alleges that defendants have engaged in an unlawful conspiracy to fix the resale price of new Volvo automobiles, parts and accessories and the resale profit on used automobiles sold by Volvo dealers contrary to the provisions of California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. The prayer for relief seeks treble damages and attorney's fees in accordance with § 16750 of that Act, but does not request damages in a specified amount. Named as defendants in the complaint are Volvo of America Corporation ("Volvo"), subsidiary and parent corporations of Volvo, and a series of Doe defendants who are identified only as parties owned, dominated and controlled by each other, and who are acting as agents for and conspiring with each other.

Defendants removed the action to this Court pursuant to 28 U.S.C. § 1441(a), alleging that the action

was within the original diversity jurisdiction of this Court as prescribed in 28 U.S.C. § 1332.[1] Plaintiffs moved to remand the action to state court on the grounds that complete diversity of citizenship was lacking and that the amount in controversy did not exceed $10,000 as required by § 1332. The motion was referred to a United States Magistrate who recommended that the motion be denied. The relevant findings of the Magistrate were: (1) that since the Doe defendants could not be used to defeat diversity, complete diversity of citizenship was present among the parties; and (2) that since attorney's fees can be considered in determining the amount in controversy, more than $10,000 was in controversy among the parties. Plaintiffs now challenge these findings on appeal from the Magistrate's findings and recommendation.

I. DIVERSITY OF CITIZENSHIP.

Plaintiffs seek to defeat diversity by relying on the Doe defendants, who, they contend, are California citizens. The difficulty with this contention is that the complaint does not allege the Does' citizenship. The Does are identified in paragraph XII of the complaint as being owned, dominated, and controlled by other Does, and as agents for and conspirators with other Does. They are all alleged to be part of the combination and conspiracy described in the complaint, but are not referred to again in the remainder of the complaint. While the complaint does refer to conspira-

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[1] 28 U.S.C. § 1332(a)(1) provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states;"

torial activities of Volvo dealers, defined in paragraph XIII as being Volvo retail dealers in California, no Doe defendant is identified as a Volvo dealer. Without a proper allegation of the identity, status and citizenship of any Doe, plaintiffs' contention that there are Doe defendants who are California citizens and thus destroy diversity must be rejected. *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 620 (9th Cir. 1957); *Molnar v. National Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); see also 2A Moore's Federal Practice § 8.10 (2d ed. 1974). Accordingly, we adopt the Magistrate's finding on this issue.

II. AMOUNT IN CONTROVERSY.

Plaintiffs also challenge the Magistrate's finding that more than $10,000 is in controversy in this litigation. Plaintiffs brought this action as a class action in the state court. While the action has not yet been certified as a class action in this Court pursuant to Rule 23, Fed. R. Civ. P., it must be treated as a class action for the purpose of determining jurisdictional issues. *City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 951-52 (9th Cir. 1972). Defendants have not argued that the class as pleaded by plaintiffs is a sham designed to defeat federal jurisdiction nor have they challenged the treatment of this action as a bona fide class action at this stage of the proceedings.

Plaintiff Rosack alleges that her claims "are typical of those to be asserted for the other members of the plaintiff class", that the "rights of plaintiff and the class members involve common questions of law and fact which predominate over any question affecting only individual members of the class," and that a class action is superior to other methods of adjudication

of the controversy. (Complaint para. VII and VIII.) Plaintiff individually and each member of the class seek treble damages, attorneys' fees and costs.

It is plain, therefore, that this is a class action falling within Rule 23(b)(3). The Supreme Court has held only recently that to meet the jurisdictional requirement in a Rule 23(b)(3) class action, each plaintiff's claim must satisfy the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In that case, the Supreme Court reaffirmed the historic rule that the "matter in controversy" requirement of Section 1332 must be satisfied by each member of the plaintiff class having a separate and distinct claim; plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims:

> "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that *any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*" 414 U.S. at 300 (emphasis supplied).

See, also, *Snyder v. Harris*, 394 U.S. 332 (1969), and *United States v. Southern Pacific Transportation*

Co., ... F.2d ...., Nos. 74-333 and 75-1080, filed September 10, 1976, at slip opinion p. 8, n. 11 (9th Cir. 1976).

The *Zahn* principle is settled beyond dispute. The questions that arise concern the manner of its application. In the usual case, *Zahn* would simply require that members of a class whose claims fall short of the jurisdictional requirement must be dismissed:

> "Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in another's coattails. 469 F.2d at 1035.'" 414 U.S. at 301.

But in *Zahn* the Supreme Court upheld the dismissal of an entire Rule 23(b)(3) class action entered on a finding that "to a legal certainty" "not every individual owner in the class had suffered . . . damages in excess of $10,000." Thus, even though some of the class members had been able to meet the jurisdictional test, the District Court nonetheless dismissed the entire action on the ground that "it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim . . ." (414 U.S. at 292).

Here we are confronted with the application of *Zahn* in the context of a removed action. While plaintiffs have not alleged any specific amount of damage claimed in the complaint, they contend on this motion that the damage claims of the individual plaintiffs resulting from the alleged price fixing could not exceed "a few dollars" in the case of parts and a "few hundred dollars" in the case of automobiles. Defendants respond that some plaintiffs were multiple purchasers of Volvos and their claims, if they had any, might therefore

well exceed $10,000. Viewing the record on this motion in the light most favorable to defendants, it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement.[2]

That conclusion is not altered by the fact that attorneys' fees which may be awarded to prevailing plaintiffs may be taken into account. Cal. Bus. & Prof. Code, § 16750. See, *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199, 202 (1933); *Stokes v. Reeves*, 245 F.2d 700, 702 (9th Cir. 1937). Attorneys fees would be awarded as a part of the separate and distinct damage recovery of each plaintiff. It appears to the Court as a legal certainty that reasonable attorneys fees when added to the damages claimed by the bulk of the plaintiffs of "a few hundred dollars" each—even after trebling—would not result in individual claims in excess of $10,000. See, *Georgia Ass'n of Ind. Ins. Ag. Inc. v. Travelers Indem. Co.*, 341 F.Supp. 841, 843-844 (N.D. Ga. 1970).[3]

It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn*, all of those plaintiffs would have to be dismissed and, if feasible, a class

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[2]The Court may look at the entire record to determine whether jurisdictional defects are cured. See Wright, Federal Courts (2d Ed. 1970) 291; *Lonnquist v. J. C. Penney Co.*, 421 F.2d 597, 599 (10th Cir. 1970).

[3]While the allocation of attorneys fees to each prevailing class member's recovery is undoubtedly sound, the result would not be altered under *Zahn* if the entire amount were allocated to the named plaintiff, resulting in one more claim likely to exceed $10,000.

substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. § 1447(c). See, *Kinsey v. General Motors Acceptance Corp.*, 359 F.Supp. 36 (D.N.D. 1973).[4]

Even if there were reason to doubt the correctness of this disposition, any doubt should be resolved in favor of remand to spare the parties proceedings which might later be nullified should jurisdiction be found to be lacking. See, *Williams v. Tri-County Community Center*, 232 F.Supp. 286, 288 (S.D. Miss. 1971), *Aff'd*, 452 F.2d 221 (5th Cir. 1971); *Lowe v. Trans World Airlines, Inc.*, 396 F.Supp. 9, 12 (S.D.N.Y. 1975); *Fernandez v. Reynolds Metals Co.*, 384 F.Supp. 1281, 1283 (S.D. Tex. 1974); *Wood v. Home Insurance Co.*, 305 F.Supp. 937, 938 (C.D. Cal. 1969).

Accordingly, the Magistrate's recommendation of June 8, 1976, is hereby set aside and the action remanded to the Superior Court in and for San Mateo County, each party to bear its own costs.

IT IS SO ORDERED.

Dated: October 19, 1976.

/s/ William W. Schwarzer
William W. Schwarzer
United States District Judge

[4]28 U.S.C. § 1441(c) would permit, but not require, the Court to retain jurisdiction of claims properly removed when joined with claims not otherwise removable. That provision does not appear applicable to a class action and most likely does not contemplate the division of a single class of plaintiffs into remandable and non-remandable subclasses. Moreover, to apply it here to justify retention of jurisdiction would simply open the door to a subsequent and inevitable dismissal of the bulk of the class members for lack of jurisdiction on the motion of the very party that invoked the jurisdiction of this Court in the first place. We are confident that this is not the result contemplated by the authors of Section 1441(c).

Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Mandamus and/or Prohibition.

United States Court of Appeals, for the Ninth Circuit.

Volvo of America Corporation, Petitioner, vs. The Honorable William W. Schwarzer, Judge, United States District Court for the Northern District of California, Respondent. Charlene P. Rosack, individually and on behalf of all others similarly situated, Real Parties in Interest. No. 76-3296.

In addition to the authorities cited in the Petition for Writ of Mandamus and/or Petition for Writ of Prohibition, filed by Volvo of America Corporation (Volvo), petitioner respectfully requests that the Court consider the following authorities:

I

THE NINTH CIRCUIT HAS STATED THAT IN A CLASS ACTION WHERE SOME PLAINTIFFS CAN MEET THE JURISDICTIONAL REQUIREMENTS AND SOME CANNOT, FEDERAL JURISDICTION IS PRESENT.

The issue before this Court is virtually identical to the issue presented in the case of *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972). In *Inglewood*, this court dealt with the question of federal jurisdiction over a class action in the context of a motion to dismiss an action originally brought

in the federal court. The instant case involves removal, but the basic issue of whether federal jurisdiction exists is the same.

In *Inglewood,* this court was confronted with a situation "in which some plaintiffs probably can meet the jurisdictional requirements, and some probably cannot." 451 F.2d at 952. This court stated the appropriate rule to be applied in such a situation as follows:

> "*When faced with a class action where the pleadings satisfy the jurisdictional amount requirements for some indeterminate number of class members, and do not satisfy them for the rest of the members, it seems to us the better practice not to dismiss the entire action at the pleading stage.* See *Town of East Haven v. Eastern Airlines, Inc.,* 282 F. Supp. 507, 516 (D. Conn. 1968). Rather, the court should decide for the individual plaintiffs which can recover and which cannot. Once these matters are resolved, the court can begin seeking a more substantial showing from the plaintiffs as to the type of proof they will be able to present. Whenever appropriate, the court can dismiss the complaints as to those parties who are clearly shown to be unable to meet the requirements of jurisdictional amount." (emphasis added) *City of Inglewood,* supra, at 953-954.

Other courts have recognized this principle. For example, in *Knapp v. Bankers Securities Corporation,* 17 FRD 245 (E.D. Pa. 1954), in a shareholders suit for direct declaration of dividends, the court found the class action there to be "spurious" and disallowed aggregation to reach the federal jurisdictional amount.

However, the court denied a motion to dismiss the action because it found that some plaintiffs had claims in excess of the jurisdictional amount:

> "However, in the present case it appears that the amount claimed by some of the plaintiffs is certainly in excess of [the jurisdictional amount] with the result that *this complaint cannot be dismissed on jurisdictional grounds.*" (emphasis added) 17 FRD at 247.

In the instant case, the District Court found that the jurisdictional amount existed as to some plaintiffs. Having found such jurisdiction, the Court's order of remand was an act in excess of its jurisdiction and contrary to the provisions of 28 U.S.C. 1447(c).

II

THE DISTRICT COURT BASED ITS REMAND ORDER ON PROCEDURAL GROUNDS NOT AUTHORIZED BY 28 U.S.C. 1447(c).

The Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer,* .... U.S. ...., 46 L.Ed.2d 542 (1976), held that an order of remand must be based on the grounds authorized by 28 U.S.C. 1447(c). An order not so grounded is reviewable by writ of mandamus.

The District Court has allowed procedural considerations, not authorized by Section 1447(c), to defeat properly attached federal jurisdiction. The basis for the District Court's order of remand was that a majority of the potential class members would not meet federal jurisdictional requirements. In essence, the Court used Rule 23 of the Federal Rules of Civil Procedure to defeat jurisdiction.

In a different context, the Third Circuit held that "a mistaken idea of procedure" is not proper ground for remand.

> *Bankers Securities Corp. v. Insurance Equities Corp.*, 85 F.2d 855, 859 (1936); see also cases cited therein.

Further, Rule 82 of the Federal Rules of Civil Procedure clearly states that the rules are not to be construed to affect jurisdiction:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

III
CONCLUSION

As has been shown, the District Court found that federal jurisdiction existed in the instant case but then remanded on grounds not authorized by the applicable statute. It is respectfully submitted therefore that the writ of mandamus and/or prohibition should issue directing the respondent Court to vacate its remand order and maintain jurisdiction over the action.

DATED: November 3, 1976.

Respectfully submitted,

PAUL, HASTINGS & JANOFSKY
DANIEL H. WILLIAMS, III
DOUGLAS C. CONROY
ROBERT S. SPAN
/s/ By Robert S. Span
ROBERT S. SPAN

Attorneys for Petitioner

Supreme Court, U. S.
FILED
FEB 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-977

VOLVO OF AMERICA CORPORATION,
Petitioner,

vs.

THE HONORABLE WILLIAM W. SCHWARZER, Judge,
United States District Court for the
Northern District of California,
Respondent.

CHARLENE P. ROSACK, individually, and on behalf of
all others similarly situated,
Real Parties in Interest

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

VOLVO OF AMERICA CORPORATION,
Petitioner,

vs.

THE HONORABLE WILLIAM W. SCHWARZER, Judge,
United States District Court for the
Northern District of California,
Respondent.

CHARLENE P. ROSACK, individually, and on behalf of all others similarly situated,
Real Parties in Interest.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Real Parties in Interest, Charlene Rosack, et al., respectfully pray that this Court deny Petitioner Volvo of America's request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 11, 1976.

QUESTIONS PRESENTED

1. Did the Court of Appeals properly deny Defendant's Petition for Writ of Mandamus, where the

District Court fully considered the jurisdictional issues, found that there was no jurisdiction, and based its Remand Order expressly upon 28 U.S.C. §1447(c)?

2. Did the Court of Appeals properly deny Defendant's Petition for Writ of Mandamus, where the District Court based its Remand Order exclusively on grounds authorized by 28 U.S.C. §1447(c)?

3. Should Defendant's Petition for Writ of Certiorari be denied where this Court, in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) has already determined that a class action *cannot* be maintained where only *some* of the class members meet the jurisdictional minimum?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1447. **Procedure after removal generally**

" * * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the State court. The court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

STATEMENT OF THE CASE

Plaintiff Charlene Rosack filed this class action in the California State Courts alleging that Petitioner Volvo of America (hereafter "Defendant"), violated the California Cartwright Act[1] through a conspiracy with its dealers to fix prices and require purchasers of Volvo automobiles to buy only Volvo parts and accessories. Defendant petitioned for removal to Federal Court based upon diversity of citizenship and plaintiffs promptly moved for remand based upon absence of the requisite amount in controversy for each member of plaintiff's class.[2]

For the next nine (9) months, the United States District Court for the Northern District of California studied a dozen briefs filed by both sides and heard a half-dozen oral arguments on these jurisdictional issues.[3] The fundamental issue before the District Court was whether attorneys' fees anticipated in a class action could be aggregated and attributed to the named plaintiff to permit jurisdiction, even though the individual class members' claims upon which these fees were based could not be aggregated under the rules established in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973).

In the arguments before Honorable Owen E. Woodruff, Jr., United States Magistrate for the Northern

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[1]California Business & Professions Code, §16700 et seq.

[2]Plaintiff also challenged Defendant's claim of diversity of citizenship, but Plaintiff's position on this issue was not accepted by the District Court and Defendant's subsequent appeals involved solely the amount in controversy issue.

[3]The numerous briefs and their dates are listed in the Appendix hereto.

District of California, Plaintiff argued that no individual purchasers of Volvo automobiles could present claims in excess of $10,000, and that neither these individual claims nor the attorney fees based on them could be aggregated to meet the amount in controversy requirement. There was never any dispute that the class members' claims themselves were "separate and distinct" and could not be aggregated under this Court's rule in *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969) and *Zahn v. International Paper Company,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). Defendant argued, however, that these rules pertaining to aggregation of claims were not relevant at this stage of the proceedings, because:

> "She [Charlene Rosack] is the only party plaintiff in the case at this time. We cannot speculate as to whether she will ever be found to represent a class of Volvo purchasers, or if such class can ever be certified."[4]

Defendant then argued that, since attorney fees could be considered in determining the amount in controversy, all the attorney fees for this suit could be attributed to the named plaintiff alone, thus giving her a claim "in excess of $10,000."[5]

The Magistrate accepted Defendant's argument and in his Order simply stated:

> "There is more than $10,000 in controversy in this litigation. Such a finding is based on the

[4]Defendant's Supplemental Brief in Opposition to Plaintiff's Motion for Remand, May 27, 1976, p. 3.

[5]*Id.*, at p. 4.

> fact that attorneys fees can be considered in determining whether the requisite amount in controversy is present. (see cases cited in defendants' brief)".[6]

Plaintiff then filed a Notice of Objections To The Magistrate's Findings And Recommendations, and pointed out the Ninth Circuit's rule in *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (1972), that an action filed as a class action *must be assumed to be a class action in determining jurisdiction* and until a contrary determination is made after a class certification motion under Rule 23.

After further briefing by both sides, the District Court, by Honorable William W. Schwarzer, held a hearing on September 10, 1976 and indicated that the Court could not accept Defendant's argument for assigning all attorney fees to the named plaintiff to satisfy the amount in controversy requirement. Defendant's counsel then suggested a totally new argument never raised in the briefs: Defendant's counsel believed a large number of plaintiffs might, in fact, have claims in excess of $10,000, because plaintiff's Complaint was filed on behalf of all persons "natural or legal" who purchased Volvo automobiles, and would therefore include corporations and other "multiple purchasers" of Volvos. The individual damage claims of these "multiple purchasers" supposedly could exceed $10,000 even though the damage claims per car would only be a few hun-

[6]Magistrate's Findings and Recomendations, Appendix to Defendant's Petition, p. 13.

dred dollars. The Court agreed to continue the hearing to allow Volvo to submit affidavits showing these multiple purchasers and to allow plaintiffs to inspect and counter such affidavits.

On September 24, 1976, Volvo submitted eight (8) Affidavits from a "sample of 20%" of the Volvo dealers in California, and these Affidavits listed twenty-eight (28) "multiple purchasers" who had each allegedly purchased enough Volvo automobiles to accumulate $10,000 in damages. The total number of cars purchased was said to be several hundred.

When Plaintiff examined the Affidavits, however, it became apparent that nearly every one of the twenty-eight "multiple purchasers" was an *automobile leasing company,* which under California law is considered an "automobile dealer" and not a "purchaser at retail" as required by Plaintiff's Complaint.[7] Of the twenty-eight (28) "multiple purchasers", only two (2) turned out to be retail buyers, as required for membership in Plaintiff's class: Between them, they had purchased 22 cars.[8]

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[7]California Vehicle Code §285; see also 57 Opinions California Attorney General 561 (1974)
Complaint, ¶ III, p. 2:
"Plaintiff, Charlene P. Rosack, brings this action on behalf of herself and all other persons, natural or legal, who purchased a new Volvo automobile at retail from a Volvo dealer located in the State of California during the period in controversy."

[8]See Plaintiff's Supplemental Brief in Support of Motion to Remand, October 7, 1976, included in Appendix hereto.
Defendant subsequently argued that other multiple purchasers might be found because Volvo surveyed only 20% of its dealers. However, all of the dealers in Defendant's affidavits were large dealers in the Los Angeles, San Francisco and San Diego areas. It cannot be seriously expected that surveys of the rural counties would much change the result.

Following arguments on these Affidavits, the Court issued its Order Setting Aside The Magistrate's Findings And Recommendations And Remanding The Action To The State Court. In a subsequent hearing, on October 26, 1976, Judge Schwarzer denied all Defendant's requests for Reconsideration or Vacation of the Order, but granted a stay until October 29, 1976 to allow Defendant to petition for a Writ. During this same hearing, Defendant's counsel questioned the court about its Order and tried to elicit from the court some statement that its remand order was not based upon §1447(c), as stated in the Order, but upon "reasons of judicial economy" and various other grounds suggested by Defendant's counsel.[9] The Court, however, refused to accept the bait and stated that the case had been "improvidently removed" (R.T. 6:23-25), that the Court's Order was "a holding under the statute that the matter does not belong here" (R.T. 7:20-21), and finally:

> "I will state for the record the only reasons for remand are those set forth in the statute. Nothing I say here is to be interpreted by anybody as being a modification, qualification, explanation, or any other kind of comment upon my prior order." (R.T. 8:15-19).

The District Court's Remand Order was to take effect on October 29, 1976, but on October 28, 1976 the Court of Appeals granted Defendant another temporary stay, to allow the Court's full Motions Panel to consider Defendant's Petition for Writ of Mandamus.

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[9]R.T. 7:5-14; 8:3-12. (Transcript included in Appendix hereto.)

Defendant's Petition set off still another round of briefing on the amount in controversy issue as well as on the propriety of review of the District Court's Order.[10] Following submission of these briefs, the Court of Appeals denied Defendant's Petition, and Defendant then applied to Justice Rehnquist for a Stay of the Remand Order.[11] Justice Rehnquist also denied Defendant's request and explained that, under 28 U.S.C. §1447(d) and this Court's recent decision in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), the Court of Appeals properly denied Defendant's Petition to review the Remand Order of the District Court.[12]

The issues raised in Defendant's Petition to the Court of Appeals, and in its subsequent application to Justice Rehnquist, are virtually identical to those raised in Defendant's present Petition to this Court for a Writ of Certiorari.

SUMMARY OF ARGUMENT

Defendant Volvo of America's Petition for Writ of Certiorari should be denied because it invites this Court to ignore two of its recent decisions. In *Therm-*

[10]See Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Defendant's Petition for Writ of Mandamus, included in Appendix hereto.

[11]The Court of Appeals Order is included in the Appendix to Defendant's Petition.

[12]Justice Rehnquist's Opinion In Chambers, On Application of Stay, *Volvo Corporation of America v. Schwarzer* (___ U.S. ___, 97 S.Ct. 28, 50 L.Ed.2d 273 (1976) is also included in the Appendix to Defendant's Petition.

tron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) this Court ruled that 28 U.S.C. §1447(d) prohibits review of remand orders where the District Court based its remand on 28 U.S.C. §1447(c). In the present case, the District Court not only based the remand expressly on §1447 (c), but specifically found that it did not have jurisdiction of the action because, under this Court's rule in *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), all but a few class members would have to be dismissed for failure to satisfy the amount in controversy requirement.

Since the District Court based its remand order on 28 U.S.C. §1447(c) and fully explained its findings on the jurisdictional issues, there is simply no basis for comparison of the present case with *Thermtron Products, Inc., supra,* where the District Court completely ignored §1447(c). Under this Court's rule in *Thermtron, supra,* the Ninth Circuit Court of Appeals was completely correct in denying Defendant's Petition for Writ of Mandamus to review the District Court's remand order. Defendant's only remaining contention has also been answered by this Court in *Zahn v. International Paper Co., supra.* Since *Zahn,* there is no question that a Court *cannot* maintain jurisdiction over a class action where only "some" of the class members meet the amount in controversy requirement.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY DENIED DEFENDANT'S PETITION FOR WRIT OF MANDAMUS, WHERE THE DISTRICT COURT THOROUGHLY CONSIDERED THE JURISDICTIONAL ISSUES, FOUND THAT THE COURT LACKED JURISDICTION, AND BASED ITS REMAND ORDER EXPRESSLY ON 28 U.S.C. §1447(c).

This Court's recent decision in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976) established a limited exception to the general rule in 28 U.S.C. §1447(d), which prohibits review of remand orders based on §1447(c):

> §1447. **Procedure after removal generally**
>
> "(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

In *Thermtron, supra,* this Court held that a Court of Appeals could review by mandamus a remand decision of a District Court *which did not even purport to base its remand order on 28 U.S.C. §1447(c),* but which instead remanded the case because of the

Court's "crowded docket". The Court explained the basis for its decision as follows:

> "Here, respondent *did not purport* to proceed on the basis that this case had been removed 'improvidently and without jurisdiction.' *Neither the propriety of the removal nor the jurisdiction of the court was questioned by respondent in the slightest. Section 1447(c) was not even mentioned.* Instead, the District Court's order was based on grounds wholly different from those upon which § 1447(c) permits remand. The determining factor was the District Court's heavy docket, which respondent thought would unjustly delay plaintiffs in going to trial on the merits of their action. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441 and hence to the question whether this cause was removed 'improvidently and without jurisdiction' within the meaning of the statute." (*Thermtron, supra,* at 423 U.S. 343-344). (emphasis added)

Nowhere in the Court's opinion is there the slightest suggestion that the ruling may be used as an excuse for wholesale review of remand orders which *are* based upon 28 U.S.C. §1447(c). The Court, in fact, emphasized that such was not the case:

> "In so holding we neither disturb nor take issue with the well established general rule that §1447 (d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." (*Thermtron, supra,* at 423 U.S. 351-352).

Earlier in its opinion, the Court explained in greater detail that §1447(d) remains a complete bar to review of remand orders issued pursuant to §1447(c):

> "It is unquestioned in this case and conceded by petitioners that this section *prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ.* This has been the established rule under § 1447(d) and its predecessors stretching back to 1887. See, e.g., In re Pennsylvania Co. 137 US 451, 34 L. Ed 738, 11 S Ct 141 (1890), Exparte Matthew Addy S.S. Co. 256 US 417, 65 L Ed 1027, 41 S Ct 508 (1921), Employers Reinsurance Corporation v. Bryant, 299 US 374, 81 L Ed 289, 57 S Ct 273 (1937), United States v. Rice, 327 US 742, 90 L Ed 982, 66 S Ct 835 (1946). *If a trial judge purports to remand a case on the grounds that it was removed 'improvidently and without jurisdiction' his order is not subject to challenge in the Court of Appeals by appeal, by mandamus or otherwise."* (*Thermtron, supra,* at 423 U.S. 343). (Emphasis added.)

In the present case, the District Court not only "purported" to remand the case pursuant to §1447(c), but also thoroughly explained the reasons for its finding that the Court lacked jurisdiction. The Court first noted that the case must be treated as a class action for jurisdictional purposes, citing the Ninth Circuit rule in *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972).[13] The Court

[13]Order Setting Aside Magistrate's Finding and Recommendation and Remanding Action To State Court, Appendix to Defendant's Petition, p. 8.

then examined this Court's definitive ruling in *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) and its application to a removed action in the present case.[14] In so doing the Court also explained its evidentiary finding on the amount in controversy issue:

> "Viewing the record on this motion in the light most favorable to defendants, it appears that only a few members of a class estimated to have some 50,000 members meet the jurisdictional requirement." (Order Setting Aside Magistrate's Findings And Recommendation And Remanding Action To State Court, Appendix to Defendant's Petition p. 11)

The Court, finally, noted that this analysis was not altered by the fact that attorney fees could be taken into account in considering the amount in controversy.[15]

All of this discussion preceded the Court's statement of its conclusions:

> *"It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims.* Under *Zahn,* all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. Accordingly, since the action could not be maintained in this Court

[14]*Id.,* pp. 9-10.
[15]*Id.,* p. 11.

on behalf of the class for which it was brought, it must be remanded. 28 U.S.C. §1447(c). See, *Kinsey v. General Motors Acceptance Corp.,* 359 F.Supp. 36 (D.N.D. 1973). (Order, *supra,* Appendix to Petition, p. 12) (Emphasis added.)

The court's Order thus fully reflects the months of consideration the court devoted to the jurisdictional issues before ordering remand pursuant to §1447(c). It is simply fatuous for Defendant to represent to this Court that Judge Schwarzer's decision compares in any way with the District Court's in *Thermtron,* or that Judge Schwarzer's Order was a mere, wooden "invocation" of §1447(c) designed to cover up a decision based on other grounds.

Justice Rehnquist has, in fact, rejected this very same argument made by Defendant in its application for a stay of the Remand Order. Justice Rehnquist stated:

"We held last Term in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U. S. 336 (1976), where the District Court ordered a remand because of its crowded docket, that § 1447(d) did not bar review of remand orders 'issued on grounds not authorized by § 1447c,' *id.,* at 343. But the District Court here *did* base its order on § 1447(c). *Thermtron* is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court 'does not have jurisdiction of this action,' see 423 U. S., at 343-344. Applicant's position would mean that any allegedly erroneous application of § 1447 (c) would be reviewable by Writ of Mandamus, leaving the § 1447 (d) bar extant only in the case of

allegedly proper application of § 1447 (c); a reading too Pickwickian to be accepted, and contrary to the clear language of *Thermtron."* (On Application of Stay, Appendix to Defendants' Petition, p. 3) (Emphasis in original)

II. THE DISTRICT COURT BASED ITS REMAND ORDER EXCLUSIVELY ON GROUNDS AUTHORIZED BY 28 U.S.C. §1447(c) AND DEFENDANT'S ASSERTIONS TO THE CONTRARY ARE BASED ON PATENT DISTORTIONS OF THE DISTRICT COURT'S ORDER.

Defendant's Petition to this Court is a compound of several serious misstatements. The most fundamental misstatement is Defendant's assertion that Judge Schwarzer relied on grounds "outside" §1447(c) in rendering his decision. Defendant asserts:

"In the present case, the District Court based its remand order on considerations relating to the maintenance of a class action. The District Court thus allowed Rule 23 of the Federal Rules of Civil Procedure to defeat properly attached federal jurisdiction."
(Petition, p. 9)

Nowhere in Judge Schwarzer's opinion does he purport to base remand upon procedural considerations relating to Rule 23, and Defendant's misrepresentations that he did so are based entirely on quotation out of context. In presenting its conclusions, the Court actually stated:

"It thus appears to a legal certainty that this Court does not have jurisdiction of this action. It is a class action brought on behalf of a class of

plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn,* all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. *Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it must be remanded."* 28 U.S.C. § 1447 (c). See, *Kinsey v. General Motors Acceptance Corp.,* 359 F.Supp. 36 (D.N.D. 1973).

(Order, supra, Appendix to Defendants' Petition, pp. 11-12) (Emphasis added.)

In Defendant's argument to this Court, Defendant simply omits the first two sentences above and fastens upon the language, ". . . since the action could not be maintained in this Court on behalf of the class for which it was brought . . . ," to suggest that the Court was relying on unspecified procedural considerations pertaining to *maintenance of class actions* under Rule 23. Every bit of the Court's Order, however, shows that remand was based entirely on the finding that all but a few class members could not meet the jurisdictional minimum and would have to be dismissed under this Court's rule in *Zahn.*

Defendant's second, important misrepresentation is the number of class plaintiffs who do meet the jurisdictional requirement of $10,000.00. In its Order, the District Court found that "only *a few* members of a class estimated to have some 50,000 members meet the jurisdictional requirements." According to defend-

ant's Petition, however, the District Court found jurisdiction over "several" plaintiffs (Petition, p. 8) and by the end of the Petition, this Court is asked to consider whether a District Court can properly remand a class action "where *some, but not all,* members of the class meet the federal jurisdictional requirements." (Petition, p. 12) These misstatements might ordinarily be excused as minor exaggerations, but in this case they are the very foundation of Defendant's argument and have been used repeatedly for nine months to delay Plaintiff's case and to massively increase her costs of litigation.

Finally, it should be noted that Defendant has also misrepresented Justice Rehnquist's opinion denying Defendant's application for a stay. Justice Rehnquist did *not* suggest that a remand order like the one in *Therntron* could be saved by the simple expedient of adding the citation "28 USC 1447 (c)" to the Court's findings. What Justice Rehnquist *did* say is that §1447(d) bars review of remand orders issued pursuant to §1447(c), *whether the orders are erroneous or not.*[16] Ever since the Petition to the Court of Appeals, Defendant has consistently tried to ignore this point by arguing, in effect, that anytime a court issues a remand order which Defendant thinks "is wrong", under the statute, the remand order must have been based on grounds "outside of" or "not authorized by" the statute.

Defendant is also incorrect in stating that, if certiorari is denied in this case, Justice Rehnquist's opin-

[16]On Application of Stay, Appendix to Defendant's Petition, p. 3, Note 3.

ion "will stand as the only interpretation of the scope of the *Thermtron* ruling." (Petition, p. 8). Several decisions of the Circuit Courts of Appeal have already interpreted *Thermtron*—and all of them prior to Defendant's Petition for a Writ here. *(Midland Mortgage Co. v. Winner,* 532 F.2d 1342; (10th Cir. April 6, 1976); *Robertson v. Ball,* 534 F.2d 63 (5th Cir. June 23, 1976); *In Re Southwestern Bell Telephone Co.,* 535 F.2d 859 (5th Cir. August 3, 1976))

For example, in *Midland Mortgage Co. v. Winner, supra,* the District judge concluded that the case had been improperly removed because three of plaintiff's five causes of action were dependent on the fourth cause of action, which was alleged against several Colorado defendants who, according to the District judge, "had no right to remove from Colorado state court." *(Midland Mortgage Co., supra,* at 1343). The Court of Appeals dismissed the Petition for Mandamus, stating:

> *We are convinced that the Court was clearly remanding the suit on grounds specified in 28 U.S.C. § 1447(c), namely that under the removal statutes the case "was removed improvidently and without jurisdiction," as the removal statute says.* This being so, the order of remand "is not reviewable on appeal or otherwise. . . ." 28 U.S.C. § 1447 (d). While a *narrow exception* for review on mandamus was recently recognized in *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542, 44 USLW 4085, *that opinion makes it clear to us that we have no jurisdiction to review the order of remand in this mandamus proceeding. We feel the Court's reasoning is clear,* 423 U.S. at 351, 96 S.Ct. at 593, 46 L.Ed.2d at 554, 44 USLW at 4090:
>
> *(Midland Mortgage Co., supra,* at p. 1344). [emphasis added].

After quoting extensively from *Thermtron,* the Court in *Midland Mortgage Co., supra,* went on to say:

> "We have no case like *Thermtron* where the District Court remanded because of the crowded condition of its civil docket, a ground not provided for remand in § 1447(c). *Without reaching or deciding whether remand was proper, in the instant case, it is sufficient to say that the Court clearly based the order of remand on grounds provided by the statute.* In these circumstances, we have no jurisdiction to review that order and the petition for mandamus must be dismissed."
>
> *(Midland Mortgage Co., supra,* at p. 1344) [emphasis added].

The Court in *Robertson v. Ball,* 534 F.2d 63 (5th Cir. 1976) reached identical conclusions, and for identical reasons (p. 65):

> "'The court below *expressly stated* that 'this action was improperly removed under Section 1441(b) . . .' because the action was not 'one of which this court would have had original jurisdiction . . .' *We have no occasion to determine whether or not this conclusion of the district court was well-founded. As we read Thermtron, the express invocation by the district court of the § 1447(c) grounds for remand of a removal under § 1441(b) robs this court of any*

power 'through appeal or otherwise,' to review the merits of the remand order."

(Robertson, supra, at p. 65) [emphasis added].

Finally, the court in *In re Southwestern Bell Telephone Co.*, 535 F.2d 859 (5th Cir. 1976) allowed mandamus to review the District Court's Order of Remand, but only because the District Judge there utilized the doctrine of "judicial estoppel" as the basis for remand, rather than investigating the jurisdictional facts. Plaintiffs there discovered a document in which defendant, Southwestern, in a prior suit, had alleged that it was a Texas corporation rather than a Missouri corporation as it now claimed. The District Judge ruled that this document "estopped" Southwestern from now claiming diversity of citizenship as to the Texas plaintiffs. The Court of Appeals issued the Writ to compel the District Court to "make a suitable inquiry into the question of whether the parties are truly diverse." *(In Re Southwestern Bell, supra,* at p. 861).

In the present case, by contrast, the District Court conducted literally months of inquiry into both the diversity of the parties and the amount in controversy. The court even permitted Defendant Volvo to survey its dealers in California and to submit massive affidavits on the amount in controversy. In short, the District Court here did precisely what the District Court in *In Re Southwestern Bell* did not do.

There are a growing number of such federal decisions to which Defendant can turn if it needs further guidance in interpreting this Court's decision in *Thermtron.*

All of these decisions, as well as Justice Rehnquist's, show that the Court of Appeals properly refused to review Judge Schwarzer's Remand Order because the order was based, *in both form and substance,* upon 28 U.S.C. §1447(c). As the Tenth Circuit stated, referring to this Court's decision in *Thermtron,* "We feel the Court's reasoning is clear . . ." (*Midland Mortgage Co., supra,* at 1344).

III. THIS COURT IN ZAHN v. INTERNATIONAL PAPER CO., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) HAS ALREADY DETERMINED THAT A CLASS ACTION CANNOT BE MAINTAINED WHERE ONLY SOME OF THE CLASS MEMBERS MEET THE JURISDICTIONAL MINIMUM.

Defendant's Petition for Certiorari, as its final argument, purports to offer a question deserving the attention of the U. S. Supreme Court. The question is whether a "District Court can remand a properly removed class action where some, but not all, members of the class meet the federal jurisdictional requirements." (Petition, p. 12) This question has already been conclusively and affirmatively answered by this Court in *Zahn v. International Paper Co., supra,* and Defendant has provided absolutely no authority and no reason for a different answer. As to the claim that the "lower federal courts have taken differing positions" on this issue, Defendant tries to pass off two cases decided *before Zahn* as in conflict with another decision after *Zahn*![17]

---

[17]Defendant attempted this same ruse before the Court of Appeals, where Defendant cited the *1972* decision of the Ninth Circuit in *City of Inglewood v. City of Los Angeles,* 451 F.2d

This Court in *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973) expressly ruled that a class action *cannot* be allowed to proceed in federal court when only *some* of the class members meet the jurisdictional requirement. In *Zahn,* the four named plaintiffs had claims in excess of $10,000, but none of the class members had sufficient claims. The District Court *refused to permit the suit to proceed as a class action and dismissed all the class members,* using language very similar to Judge Schwarzer's here. This court summarized the District Court's ruling as follows:

> "Reading Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), *as precluding maintenance of the action* by any member of the class whose separate and distinct claim did not individually satisfy the jurisdictional amount and concluding that *it would not be feasible to define a class of property owners each of whom had more than a $10,000 claim, the District Court then refused to permit the suit to proceed as a class action.*"
>
> (*Zahn, supra,* at 414 U.S. 292) (*emphasis added)*

Both the Court of Appeals and this Court affirmed the District Court's decision, and in so doing, this Court stated:

948 (9th Cir. 1972) for the proposition that a class action should not be dismissed where some plaintiffs meet the jurisdictional minimum and some do not. This proposition was expressly rejected by *Zahn* in 1973. Plaintiff also cited *City of Inglewood,* but for a different, and still valid, proposition.

> "None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that the rationale of that case controls this one. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that *any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims.*" 414 U.S. at 300 (emphasis supplied). (Emphasis in original)
>
> (*Zahn* at 414 U.S. 300)

This language from *Zahn* is precisely the same language relied on by Judge Schwarzer in his Remand Order. (Order, Appendix to Petition p. 9)

Finally, it should be noted that *Zahn* has also been interpreted to preclude any type of "pendent party jurisdiction", whereby jurisdiction over class members who fail to meet the amount in controversy requirement could be sustained, based on jurisdiction over those members who do meet it. In *Freeman v. Gordon & Breach, Science Publishers, Inc.*, 398 F. Supp. 519 (S.D.N.Y., 1975), the District Court for the Southern District of N.Y. reviewed the post-*Zahn* cases pertaining to "pendent party" jurisdiction and stated:

> "We agree with the authorities discussed *supra* that whatever vitality the doctrine of pendent

parties may have in other contexts (*i.e.*, federal or admiralty claims), *Zahn* effectively forecloses the invocation of pendent party or ancillary jurisdiction to sustain federal jurisdiction over a diversity claim not in excess of $10,000."

(Freeman, supra, at p. 526)

The Ninth Circuit has, in any event, long rejected the notion of pendent jurisdiction over parties. *(Hymer v. Chai,* 407 F.2d, 136 (9th Cir. 1969); *United Pacific/Reliance Ins. Cas. v. Lewiston,* 372 F.Supp. 700 (D. Idaho 1974).

Both *Zahn* and the cases interpreting it thus confirm that the District Court here properly analyzed the jurisdictional issues in ordering remand of this class action. It has been plaintiff's position throughout this litigation that *Zahn* is dispositive of Defendant's claim to federal jurisdiction. Now, as in the first hearing before the Magistrate in the District Court, Defendant is simply unable to produce any authority contrary to *Zahn* or any reason why *Zahn* should not apply. What defendant has been able to do, with the resources so abundantly available to it, is finance a year of litigation to prevent the prompt application of this Court's settled rule in *Zahn.*

CONCLUSION

Defendant's Petition for Writ of Certiorari fails to present any claims deserving the attention of this Court. The District Court's opinion shows beyond any doubt that the court thoroughly considered the jurisdictional issues and based its Remand Order expressly on 28 U.S.C. §1447(c). Having done so, the Court of Appeals was not empowered to review the District Court's decision. This Court's own decision in *Thermtron* fully supports the Court of Appeals' refusal to review the District Court's order. Finally, Defendant has presented virtually no reason for this Court to restate its settled rule in *Zahn,* a rule properly applied by the District Court in this case.

For all of these reasons, Defendant's Petition for Writ of Certiorari should be denied.

Dated, San Francisco, California,
February 14, 1977.

COTCHETT, HUTCHINSON & DYER,
JOSEPH W. COTCHETT,

CARTWRIGHT, SAROYAN,
MARTIN & SUCHERMAN, INC.,
JAY R. MARTIN,
RANDALL D. MORRISON,

BROWN, WRIGHT & KAUFMAN,
HAROLD C. WRIGHT,
Attorneys for Real Parties in Interest Charlene P. Rosack, individually, and on behalf of all others similarly situated.

(Appendix Follows)

APPENDIX

Appendix

BRIEFS FILED IN DISTRICT COURT REGARDING JURISDICTIONAL ISSUES

1. Plaintiff's Notice of Motion and Memorandum for Remand, April 26, 1976;
2. Defendant's Memorandum in Opposition to Motion for Remand, May 7, 1976;
3. Plaintiff's Memorandum in Support of Motion to Remand, May 12, 1976;
4. Defendant's Supplemental Memorandum in Opposition to Motion to Remand, May 27, 1976;
5. Plaintiff's Supplemental Memorandum in Support of Motion to Remand, June 3, 1976;
6. Plaintiff's Objections to Magistrate's Findings, June 11, 1976;
7. Defendant's Reply to Plaintiff's Objections, August 30, 1976;
8. Defendant's Supplemental Brief and Reply to Plaintiff's Objections, September 7, 1976;
9. Defendant's Supplemental Brief and Affidavits Regarding Amount in Controversy, September 24, 1976;
10. Plaintiff's Reply Regarding Amount in Controversy, October 7, 1976;
11. Defendant's Supplemental Reply Regarding Amount in Controversy, October 12, 1976;
12. Defendant's Request for Reconsideration and Memo Regarding Jurisdiction of District Court to Stay or Modify, October 25, 1976.

In the United States District Court
Northern District of California

Case No. 76-742-WWS

Before: Honorable William W. Schwarzer, Judge

Charlene P. Rosack, Individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L,

Defendants.

REPORTER'S TRANSCRIPT
Tuesday, October 26, 1976

Reported by: Shirley Linkerman

Appearances:

For the Plaintiffs:

Messrs. Cotchett, Hutchinson & Dyer
Bank of California Building
El Camino Real at Fourth Avenue
San Mateo, California
By: Susan Illston

and

Messrs. Cartwright, Saroyan, Martin & Sucherman, Inc.
160 Sansome Street—Suite 900
San Francisco, California 94104
By: Randall D. Morrison, Esquire

For the Defendants:

Messrs. Paul, Hastings & Janofsky
555 South Flower Street
Los Angeles, California 90071
By: Daniel H. Williams, III, Esquire

Tuesday, October 26, 1976

THE CLERK: Civil Case No. 76-742, Charlene Rosack versus Volvo of America.

Counsel, appearances, please.

MR. WILLIAMS: Daniel Williams for Volvo.

THE COURT: You haven't filed any more papers since yesterday, have you?

MR. WILLIAMS: No, I haven't.

THE COURT: What have you filed this morning or today, Reply to Defendants' Request For Reconsideration?

MR. MORRISON: That's right, Your Honor, there's another motion pertaining to the Request For Stay, which I believe counsel has filed.

MS. ILLSTON: Yes, Your Honor, I believe it was filed yesterday.

THE COURT: We have had no shortage of papers.

Let me ask, Mr. Williams, what do you intend to do—I don't mean in this court--what are your plans in this matter? Are you going to file a writ of mandate?

MR. WILLIAMS: Yes, sir.

THE COURT: When are you going to file it?

Have you had it all done?

MR. WILLIAMS: No, I don't.

THE COURT: I am surprised, you had all weekend.

You know, that is the only way you can get anywhere, if you have any remedy at all. I don't think the Court of Appeals would entertain a writ of mandate.

MR. WILLIAMS: I wonder if the Court of Appeals would entertain if the Court would reconsider the motion?

THE COURT: I am not going to reconsider the motion. We spent a lot of time the first time. I don't have any reason to believe what we have done is not right.

MR. WILLIAMS: I will be prepared to go to the Court of Appeals tomorrow for a writ of mandate.

I can file the writ by the end of the week.

THE COURT: I will give you a 48-hour stay. I would think you people can turn this writ of mandate out in a couple of hours with all the briefing you have done in this. You just need to take what you have done and just put it together in a little different form.

MR. WILLIAMS: I appreciate the Court's confidence in our ability. I will relay that to my secretary, as far as typing, Your Honor.

THE COURT: It's going to be short, anyway.

MR. WILLIAMS: I think the request will be.

I would appreciate it if we could get a stay until Monday so I could have the weekend to proofread and work on it. I would like to present a polished document.

THE COURT: I don't think that is appropriate. I will give you a 48 hours stay, I think that is plenty of time to prepare a writ of mandate.

I think that I do that out of an abundance of—I don't know what it is, consideration or kindness. I don't think there is any merit, I don't think you have got any right to review this matter, but I think you ought to have a chance to go to the Court of Appeals, and I think that is enough time.

And it seems to me there isn't anything that hasn't been said already that you are going to say to the Ninth Circuit.

So, let's see. What we will do is we will stay the effective time of this order until the close of business—well, let's say the close of business on Friday, October 29th, that is 4:30, Friday, October 29.

Until that time, we will hold the order up.

And, depending on the state of affairs at that time, that is my disposition now.

I don't think that the plaintiffs will be unduly injured by that, adversely affected.

MS. ILLSTON: Susan Illston appearing for Plaintiff Rosack.

Your Honor, just so the record is clear on that, I would like to voice our opposition to any stay order being entered. We feel there is no merit whatever. The seven-month delay is plenty of delay, plenty of time.

Just so you are clear, we vociferously object to that.

THE COURT: I understand you to object. This order will go into effect on Friday at 4:30 unless there is some kind of an order staying further proceedings.

And I intend to entertain no further motions or appeals or applications of any kind. And it will be remanded as of Friday, October 29 at 4:30 p.m., unless there is some superseding order that is issued in the meantime.

MR. WILLIAMS: Your Honor, so that the record is clear, I have made a request to the Court in writing for certification of various issues pursuant to 180 U.S.C. 1292(b), just so I have a record I have a ruling on that.

THE COURT: Yes, it's on file. And we have given a good deal of thought to that over the weekend and concluded we simply can't certify.

We think the provisions in the statute are clear, and the Supreme Court has made it clear it is not an appealable order, and it falls outside—the way I read the statute and the decisions, it simply says outside

of 180 U.S.C. 1292(b). If there is a way to have the matter reviewed, it's only by of writ of mandate. I don't think a writ of mandate wise when there is a finding by the District Court the matter has been improvidently removed.

That is a matter you can take before the Supreme Court—before the Court of Appeals.

MR. WILLIAMS: Yes, Your Honor, I understand what the Court is saying.

If I might point something out to the Court without belaboring the point, it's not my understanding that the Court ruled that the matter is improvidently removed. I looked up the meaning of improvidently, and I think that means wrongfully or without legal basis. I have a case to cite that. And inasmuch as I think the Court found there were some plaintiffs who could not set forth the requisite amount of jurisdictional—is it my understanding of the Court ruling this was improvidently removed and without jurisdiction?

THE COURT: Well, I think the ruling speaks for itself. I am not going to get into a debate as to what my words meant.

I think that order will have to stand on its own bottom. And you can interpret it any way you see fit.

It certainly is a holding under the statute that the matter does not belong here.

MR. WILLIAMS: Well, just so——

THE COURT: For the reasons specified in the statute.

MR. WILLIAMS: I understand that, Your Honor, and I am not trying to argue with the Court.

THE COURT: I understand.

MR. WILLIAMS: It is my understanding of the Court's ruling, just so we have a clear record, so I am not faced with assertions by the plaintiffs that the matter was improvidently removed and so found to be by the Court, it is my understanding of the Court's ruling what the Court found was that the vast majority of the plaintiffs could not meet the jurisdictional amount requirement, and for reasons of judicial economy, and for other reasons, had to be sent back to the State Court, even though there were plaintiffs who could meet the jurisdictional amount requirement.

THE COURT: I agree with you we should have a clear record.

I will state for the record the only reasons for removal are those set forth in the statute. Nothing I say here is to be interpreted by anybody as being a modification, qualification, explanation, or any other kind of comment upon my prior order.

That will have to stand or fall on its own bottom.

MR. WILLIAMS: Our request for certification then is denied?

THE COURT: It is denied.

MR. WILLIAMS: Thank you very much, Your Honor.

THE COURT: Is that all we have before us?

MR. WILLIAMS: I don't think we have anything further. We got the stay, and the certification has been denied, and the reconsideration has been.

THE COURT: I will say, in any event, it was a very interesting question.

MR. WILLIAMS: We appreciate it.

MR. MORRISON: Thank you, Your Honor.

MS. ILLSTON: Thank you very much, Your Honor.

CERTIFICATE OF REPORTER

I, the undersigned Official Reporter of the United States District Court for the Northern District of California, 450 Golden Gate, San Francisco, California, do hereby certify:

That the foregoing transcript, Pages No. 1 through 9, inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such Official Reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

(Signed) Shirley S. Linkerman

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United States Court of Appeals
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United States District Court—Northern District
of California

Case No. C-76-0742 WWS

Volvo of America Corporation,
Petitioner,

vs.

The Honorable William W. Schwarzer, Judge, United States District Court for the Northern District of California,
Respondent.

Charlene P. Rosack, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L,
Defendants.

[Filed Nov. 3, 1976]

MEMORANDUM IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY OF REMAND ORDER.

INTRODUCTION

Plaintiff submits this memorandum to more fully develop points which were only hastily sketched in the memorandum submitted October 28, 1976. Plaintiff received defendant's petition only a few hours before submitting its own response, and did not have time to prepare a thorough, polished document for the court's review. Plaintiff also regrets that a decision to stay the District Court's order was made within a few hours after defendant's petition was received and before plaintiff's opposition papers could be delivered to the court.

ARGUMENT AND AUTHORITIES

I. *Thermtron* Prevents Review of the District Court's Order by Extraordinary Writ or Otherwise, Since the Court's Order of Remand Was Based On 28 U.S.C. 1447(*c*).

Plaintiff's previous briefs in opposition to the Petition for Writ of Mandamus and to defendant's earlier Request for Reconsideration of the District Court's order contain a full discussion of *Thermtron Products, Inc. v. Hermansdorfer,* 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). (See plaintiff's Memorandum in Opposition to Motion to Certify Interlocutory Appeal, pp. 2-4; plaintiff's Opposition to Writ of Mandamus, pp. 1-4.) At this point, both plaintiff and

defendant agree that *Thermtron* expressly prohibits review of remand orders based on Section 1447(c). The *Thermtron* court stated:

> *"It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ.* This has been the established rule under §1447(d) and its predecessors stretching back to 1887. See, e.g., *In re Pennsylvania Co.,* 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890); *Ex parte Mathew Addy S.S. Co.,* 256 U.S. 417, 41 S.Ct. 508, 65 L.Ed. 1027 (1921); *Employers Reinsurance Corporation v. Bryant,* 299 U.S. 374, 57 S.Ct. 273, 81 L.Ed. 289 (1937); *United States v. Rice,* 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). *If a trial judge purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," his order is not subject to challenge in the Court of Appeals by appeal, by mandamus or otherwise."* (Emphasis added.) *(Thermtron, supra,* at 589.)

Two points now deserve further emphasis. The first is the vast difference between *Thermtron,* where the District Court totally ignored §1447(c), and the present case, where the District Court thoroughly analyzed the jurisdictional issues and based its remand order expressly on §1447(c). The second point is the special care the *Thermtron* court took in limiting its rule and trying to avoid the very interpretation of its decision which defendant offers here.

First of all, it is clear that the Supreme Court in *Thermtron* based its decision that mandamus was

appropriate on the fact that the District Court had remanded the case *solely* on the basis of the court's own "crowded calendar" and without purporting in any way to base its remand on lack of jurisdiction under Section 1447(c). *Indeed, the District Court there expressly conceded in its memorandum opinion that the petitioners had a right to remove the action.* (See *Thermtron, supra,* at 548.) The District Court there incorrectly decided that petitioner's right to removal had to be "balanced against plaintiff's right to a forum of their choice and their right to a speedy decision. . . ." *(Thermtron, supra,* at 547-548.)

These facts in *Thermtron* could not be farther from the facts in the present case, where the District Court entertained over a dozen briefs and seven months of argument on the jurisdictional issues before explicitly finding that jurisdiction was lacking and basing its order of remand on that ground. The court's finding of lack of jurisdiction and the court's reliance on 28 U.S.C. 1447(c) are fully obvious in the following passage from the order:

> *"It thus appears to a legal certainty that this Court does not have jurisdiction of this action.* It is a class action brought on behalf of a class of plaintiffs the vast majority of which do not satisfy the amount in controversy requirement with respect to their separate and distinct claims. Under *Zahn,* all of those plaintiffs would have to be dismissed and, if feasible, a class substantially different from that on whose behalf the action was brought certified. *Accordingly, since the action could not be maintained in this Court on behalf of the class for which it was brought, it*

must be remanded. 28 U.S.C. §1447(c). See, *Kinsey v. General Motors Acceptance Corp.,* 350 F. Supp. 36 (D.N.D. 1973)." (Emphasis added.) (Order, pp. 6-7.)

In the hearing which followed Judge Schwarzer's remand order, defendant's counsel tried to lure the court into saying that its order was based upon "reasons of judicial economy" rather than upon "improvident removal" and "lack of jurisdiction". (See statements made by Mr. Williams, defense counsel, at pp. 6-7 of the Reporter's Transcript of Hearing, Exhibit B hereto.) In so doing, defense counsel was obviously trying to entice the court into stating that its order was based upon something other than §1447(c). Defense counsel hoped to then suggest to the Ninth Circuit that the District Court had "gone outside the statute" and relied upon "reasons of economy" or some other reasons, which would make this case appear similar to *Thermtron.*

Defendant's attempt to extract from Judge Schwarzer some such interpretation of his order was completely unsuccessful. The court clearly stated that the case had been "improvidently removed" (R.T. 6: 23-25) and that the court's order is "a holding under the statute that the matter does not belong here" (R.T. 7:20-21). The court thus refused to accept defendant's bait to reinterpret its own order, and the court stated flatly:

> "I will state for the record the only reasons for removal are those set forth in the statute. Nothing I say here is to be interpreted by any-

> body as being a modification, qualification, explanation, or any other kind of comment upon my prior order."

Both the order and the court's statements leave no doubt that remand *was* based upon the statute, 28 U.S.C. 1447(c).

Finally, it should be noted that the Supreme Court in *Thermtron* was aware that its decision offered a temptation to all those seeking an excuse for a review of orders of remand. The Court was therefore careful to limit its ruling. For example, the Court noted that the District Court and the Court of Appeals there had not even suggested that the "case was not removable under Section 1441 or that it had been improvidently removed from the state court for want of jurisdiction or otherwise." *(Thermtron, supra,* at 551.) Plainly, it would have made a crucial difference if the District Court there, like the Court here, found the case improvidently removed for lack of jurisdiction. The *Thermtron* court later stated:

> "In so holding we neither disturb nor take issue with the well-established general rule that §1447 (d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute." *(Thermtron, supra,* at 554.)

Every bit of the court's language in *Thermtron* demonstrates that it was not intended to allow wholesale review of remand orders where the District Court, as in the present case, has given long and thorough

consideration to the jurisdictional questions and remanded the case expressly on that basis.

II. Defendant's Assertion That the Court Went "Outside the Statute" In Ordering Remand Is Based On Verbal Confusion and Logical Error.

The record of hearings, the briefs, the Court's order of remand, and the transcript of the hearing all demonstrate that the order was founded upon 28 U.S.C. 1447(c). The only reason defendants are tempted to argue otherwise is their own confusion of terms. Essentially, defendant's argument is this: the court found jurisdiction over some plaintiffs (defendants say "several", while the Court said "a few"). Defendants then assert that, since the Court *"found jurisdiction"* in some sense, the Court must have gone outside the statute to order remand. The error should be obvious. *Even if the Court did find jurisdiction over a few plaintiffs, this finding is not equivalent to finding "jurisdiction" per se or finding jurisdiction over the class action which was before the Court.* In fact, the Court expressly ruled that it *did not* have *jurisdiction of the action.* (Court's Order, 6:19-20.) In so doing, the Court based its remand order on the very grounds specified in the statute and did not go "outside the statute".

Defendant's whole argument thus rests upon the mistaken belief that finding jurisdiction over a few plaintiffs, if any, is coextensive with finding jurisdiction over the action. This error is obvious in several passages in defendant's brief (see, for example, 11:

26-28, 14:19-25). It is only by leaving out the Court's crucial finding of *no jurisdiction* that defendant can then leap to the conclusion that the Court relied on "extraneous factors" beyond the statute, as in the following passage from defendant's brief:

> "The sole ground for the respondent's remand order was that a majority of the purported class plaintiffs would not have claims in excess of $10,000. However, 28 U.S.C. 1447(c) does not authorize such a ground for an order of remand. *In essence, the respondent has allowed extraneous factors, such as expedition of the Rule 23 class action, to defeat federal jurisdiction which had properly attached upon removal."* (Emphasis added.) (Defendant's Petition for Writ of Mandamus, 14:19-25.)

Defendant here ignores the fact that the Court found jurisdiction lacking and that 28 U.S.C. 1447(c) *does* authorize remand on that basis. Defendant's argument really amounts to saying that any time a court issues a remand order which defendant thinks "is wrong" under the statute, this means the court must have "gone outside the statute". Such an argument is totally fallacious and is nothing more than verbal hijinks.

III. The District Court Correctly Remanded a Class Action Where All, Or Nearly All, the Class Members Did Not Meet the Jurisdictional Minimum, Where the Named Plaintiff Herself Did Not Meet the Jurisdictional Minimum, and Where It Would Be Pure Speculation To Say

Whether Any Plaintiffs Could Be Found To Meet the Jurisdictional Minimum.

The Court's order shows that *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), requires that each plaintiff satisfy the jurisdictional amount requirement in a class action where, as here, the individual plaintiffs' claims are separate and distinct. *Zahn* also requires that ". . . any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims." (414 U.S., at 300, cited at page 4, Court's Order.) In *Zahn,* the Supreme Court affirmed the District Court's *refusal to allow the case to proceed as a class action after the District Court had concluded that "It would not be feasible to define a class of property owners each of whom have more than a $10,000 claim. . . ."* (Emphasis added.) *(Zahn, supra,* at 507.) The Supreme Court in *Zahn* thus *affirmed dismissal of the class action, by affirming dismissal of all the class members* when they failed to meet the jurisdictional minimum. The only plaintiffs who were not dismissed were the four named plaintiffs, each of whom had a claim in excess of the jurisdictional amount.

It is obvious from *Zahn* that a court *cannot maintain jurisdiction over an entire class action where only a few of the plaintiffs* (there, the named plaintiffs) meet the jurisdictional minimum. If this is what defendant suggests in the present case, defendant's argument is completely contrary to *Zahn,* where the court expressly dismissed all the other class members. Indeed, the argument for dismissal in the present case is even stronger than in *Zahn,* because here *not even the named plaintiff has a claim which meets the jurisdictional minimum.* Ms. Rosack would herself have to be dismissed from this action, because she purchased only one Volvo automobile and could not possibly have a claim in excess of $10,000 for price-fixing on that single automobile. Ms. Rosack is not one of the "multiple purchasers" upon whom defendant hoped to rest jurisdiction here.[1] Since the named plaintiff here does not meet the jurisdictional minimum and would have to be dismissed along with the other class members, defendant can take no comfort from the possibility[2] that the named plaintiffs in *Zahn* might have been allowed to continue the suit individually.

[1]Defendant offered the "multiple purchaser" theory to the District Court by submitting affidavits purportedly showing some 28 multiple purchasers of Volvos, each of whom was supposed to have a damage claim in excess of $10,000 when the price-fixing damages per car were added to treble damages and to that plaintiff's portion of the anticipated attorneys' fees. Nearly every one of these purported purchasers, however, turned out to be a leasing company, which in California is considered an automobile "dealer" rather than a "retail purchaser" as required by plaintiff's complaint. Hence, the court could find, at most, that only "a few" purchasers met the jurisdictional minimum (Court's Order, pp. 6-7).

[2]In *Zahn* the named plaintiffs *commenced* the action in federal court and met the jurisdictional minimum. The present case is a *removed action* where the named plaintiff *does not* meet the minimum and would *not* want to continue individually.

Defendant's bootstrap argument regarding this named plaintiff is completely frivolous. Defendant states that "[t]he court never specifically found that the named plaintiff, Charlene Rosack, did not have a claim in excess of $10,000," but the *very passage* defendant quotes shows that the Court knew she *did not* have such a claim and *could not* have one *unless* all the attorneys' fees were assigned to her, a move the Court had just rejected.

The fact that the named plaintiff here fails to meet the jurisdictional minimum has also been held sufficient basis *to dismiss the entire class action. (Kinsey v. General Motors Acceptance Corp.,* 359 F.Supp. 36 (D.N.D. 1973).) In *Kinsey,* the court reviewed numerous cases where the named plaintiff did not have a damage claim in excess of $10,000 but other class members purportedly did have such claims. After examining these cases, including the Ninth Circuit decision in *City of Inglewood v. City of Los Angeles,* 451 F.2d 948 (9th Cir. 1972), the court concluded:

> "The above cases illustrate that if the representative plaintiff cannot meet the jurisdictional requirement, the class action must be dismissed, unless he falls within a situation where aggregation is permissible." *(Kinsey, supra,* at 40.)

Kinsey thus allows *complete dismissal* of the entire class action and eliminates defendant's claim that the Court could retain jurisdiction based on a few class members who might qualify.

Kinsey cuts the last thread upon which defendant has tried to hang jurisdiction—the mere possibility that somewhere, somehow, a few class members might be found who have claims in excess of $10,000, even though the named plaintiff and the overwhelming majority of the 50,000 class members do not. In its order, the Court stated that, even viewing the record *most favorably to defendants,* only "a few" members of the class estimated at 50,000 could meet the jurisdictional minimum. (Court's Order, 6:1-4.) It would have been pure speculation for the Court to retain jurisdiction in the hope that some such individuals

would later step forward. In any event, the Court had no choice but to remand the action since *Zahn* required dismissal of the named plaintiff and nearly all the class members, and *Kinsey* required dismissal of the entire class action.

IV. Regardless Of Whether Defendant Thinks the District Court's Order Erroneous, the Order *Was* Based Upon 28 U.S.C. §1447 and Is Not Reviewable. There Was No "Abuse Of Discretion".

The Supreme Court in *Thermtron* stated:

> "It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to §1447(c) *whether erroneous or not, and whether review is sought by appeal or by extraordinary writ."* (Emphasis added.) *(Thermtron, supra,* at 549.)

The absolute maximum that defendant could possibly claim here is that the Court's Order of Remand, based upon *Zahn,* was erroneous. Any suggestion that the Court's order was based upon something else is patently false. Even if the Court *had* erred, which plaintiff absolutely denies, the Supreme Court's own language in *Thermtron* still requires rejection of defendant's request for mandamus here. The court in *Thermtron* stated flatly that "error" was not enough.

Other courts have explicitly required that the party seeking mandamus show "abuse of discretion". For example, in *Pfizer, Inc. v. Lord,* 55 F.2d 612 (1975), the court stated:

> "The traditional use of the writ [of mandamus] in aid of appellate jurisdiction has been to confine

a lower court to a lawful exercise of its prescribed jurisdiction. Thus, '[t]he writ is appropriate issued . . . when there is a "usurpation of judicial power" or a clear abuse of discretion.' *Schlagenhauf v. Holder,* 379 U.S. 104, 110, 85 S.Ct. 234, 238, 13 L.Ed.2d 152 (1974); *River Valley, Inc. v. Dubuque Cty.,* 507 F.2d 582, 585 (8th Cir. 1974). However, mandamus is not to be used when the most that can be claimed is that the district judge may have erred in ruling on a question clearly within his jurisdiction. *Will v. United States,* 389 U.S. 90, 104, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967)." *(Pfizer, supra,* at 614.)

The *Pfizer* court also noted that the mere fact that the court allegedly erred on "jurisdictional questions" does not amount to a usurpation of power making mandamus appropriate. The court stated:

"It is true that this petition . . . challenges what can fairly be called a jurisdictional ruling. But that difference alone is not enough to make a peremptory writ appropriate . . . *The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus."* (Emphasis added.) *(Pfizer, supra,* at 615.)

Given these well-established rules, there is absolutely no basis for defendant's claim here that a writ of mandamus issue. Even given the benefit of every doubt, the most defendant can claim here is error, not

abuse of discretion. For this reason, as well as the fact that the Court based its remand order expressly on §1447(c), no review is permitted by mandamus or otherwise.

CONCLUSION

The District Court here thoroughly considered every jurisdictional issue and remanded the case after it found jurisdiction lacking. The Court relied expressly on §1447(c) in its Order of Remand. The Court's order is therefore final and non-reviewable under *Thermtron.* The District Court also correctly ruled on the jurisdictional questions, finding *Zahn* dispositive. Defendant has no credible argument to the contrary and has simply invented another challenge to further delay remand to the State Court which should have jurisdiction here.

Dated: November 3, 1976.

Cartwright, Saroyan, Martin
& Sucherman, Inc.
/s/ Randall D. Morrison
Randall D. Morrison
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

I, Jennifer Werner, declare under penalty of perjury:

That I am a citizen of the U.S.A., over the age of 18 years and not a party to or interested in the within entitled cause; that I am an employee of Cartwright, Saroyan, Martin & Sucherman, Inc., and my business address is 160 Sansome Street, Suite 900, San Francisco, California 94104.

That I served by mail the following document:

MEMORANDUM IN OPPOSITION TO DEFENDANT'S PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR STAY OF REMAND ORDER

in the following manner:

I enclosed a true copy of said document in an envelope, addressed as follows:

Robert S. Span, Esq.
Paul, Hastings & Janofsky
Twenty-Second Floor
555 South Flower Street
Los Angeles, CA 90071

Brown, Wright & Kaufman
2500 El Camino Real, Suite 411
Palo Alto, CA 94306

Joseph W. Cotchett, Esq.
Susan Illston, Esq.
Cotchett, Hutchinson & Dyer
Bank of California Building
El Camino Real at Fourth Avenue
San Mateo, CA 94402

I sealed said envelope and deposited it so sealed and addressed on the 3rd day of November, 1976, with the said document enclosed therein and with the postage thereon fully prepaid, in the United States Post Office, in the City and County of San Francisco, State of California.

Executed on November 3, 1976, in San Francisco, California.

/s/ Jennifer Werner
Jennifer Werner

Jay R. Martin, Esq.
Randall D. Morrison, Esq.
Cartwright, Saroyan, Martin
& Sucherman, Inc.
160 Sansome Street, Suite 900
San Francisco, CA 94104
Telephone: (415) 433-0440
Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-76-742 OJC

Charlene P. Rosack, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
Volvo of America Corporation, Aktiebolaget Volvo, Volvo Western Distributing, Inc., and Does I through L,
Defendants.

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

[Filed Oct. 7, 1976]

INTRODUCTION

In the previous hearing, plaintiff established that defendant's theory of aggregating attorney's fees to satisfy the amount in controversy was untenable. This

theory was a last minute attempt to create federal jurisdiction when it was otherwise lacking. The same is true for defendant's present attempt to conjure up plaintiffs whose damage claims would exceed $10,000.00. Instead of showing a credible number of such plaintiffs and a reasonable liklihood that they could meet the $10,000.00 minimum, defendants' efforts have produced a grand total of *two retail purchasers* of Volvo automobiles, required by plaintiff's complaint, and even these two purchasers do not have claims in excess of $10,000.00. Defendants' affidavits therefore fail to show that *any* of the class plaintiffs here can satisfy the amount required for federal jurisdiction.

ARGUMENT AND AUTHORITIES

I

Nearly all of the Volvo purchasers listed in defendants' affidavits are *auto leasing companies* which are *"dealers"* under California law and not retail purchasers as required by plaintiff's complaint

Paragraph III of plaintiff's first cause of action states:

> "Plaintiff, Charlene P. Rosack, brings this action on behalf of herself and all other persons, natural or legal, who purchased a new Volvo automobile *at retail* from a Volvo dealer located in the State of California during the period in controversy."

Nowhere in the complaint does plaintiff purport to represent *wholesale* purchasers of any sort—whether leasing companies, discount houses or other non-retail

purchasers. Yet, these are precisely the types of purchasers defendant offers here.

Of the 28 auto purchasers listed in defendants' 9 affidavits, the overwhelming majority are auto leasing companies, which under California law are considered auto "dealers". Vehicle Code §285 defines a dealer as follows:

> "'Dealer' is a person not otherwise expressly excluded by Section 286 who:
>
> "(a) For commission, money, or other thing of value, sells, exchanges, buys or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in, a vehicle subject to registration under this code, or induces or attempts to induce any person to *buy or exchange an interest in* a vehicle and, who receives or expects to receive a commission, money, brokerage fees, profit, or any other thing of value, from either the seller or purchaser of said vehicle, or
>
> "(b) Is engaged wholly or in part in the business of selling vehicles or buying or taking in trade, vehicles for the purpose of resale, selling, or offering for sale, or consigned to be sold, or otherwise dealing in vehicles, whether or not such vehicles are owned by such person."

This provision has been interpreted in a recent and thorough California Attorney General's opinion which expressly considered the question *whether automobile leasing companies are dealers under California law.* The opinion focused on the language, "a sale or exchange of an interest in . . ." in Vehicle Code §285, and concluded that leasing companies *were* dealers:

"The Legislature . . . expressly provided that a dealer is a person who 'negotiates or attempts to negotiate, a sale or exchange *of an interest* in, a vehicle . . .' (§285) (emphasis added) and thus broadened that which a person must 'sell' in order to qualify as a 'dealer' to include not only title, which is what a sale is commonly construed to convey, but an 'interest' which is generally viewed as something less than title or full ownership. . . ."

"By defining a dealer to be a person who negotiates or attempts to negotiate a sale or exchange of an 'interest' in a vehicle, therefore, the Legislature has indicated by the very language they choose (sic) to utilize that a dealer can be a person who not only 'sells' a vehicle, and thus transfers title as well as possession for consideration, *but also a person who 'sells' an interest in a vehicle, that is, one who transfers something less than title for consideration, thus creating what amounts to a bailment or a lease of the motor vehicle.*" (emphasis added)

The opinion goes on to conclude,

"Thus, it is our opinion that the Legislature intended leasing companies to be "dealers" under section 285. This interpretation is reinforced by section 285(b) which states that a dealer is a person who 'is engaged wholly or in part in the business of selling vehicles or buying or taking in trade, . . . *or otherwise dealing in vehicles*' (emphasis added), that is one who otherwise "traffics, transacts business or trades" in vehicles." (57 Opn. CA Atty General 561 [1974].

Since auto leasing companies in California are "dealers", they are obviously not "retail purchasers"

and do not fit the description of the class members given in plaintiff's complaint. The court can, of course, take judicial notice of the commonly known fact that leasing companies do not pay the "retail" price or the cars they purchase. This analysis eliminates 23 out of 27 buyers listed by defendant. (Twenty-one of the purchasers are leasing companies by name and two others are leasing divisions of banks, Wells Fargo and Security Pacific Bank, listed in defendant's Exhibit "E", Page -2-). Of the remaining five (5) parties, two (2) are not purchasers at all, but lessees of Volvos (National University of San Diego and D.L. Glaze Company of San Francisco). A third alleged purchaser, Nationwide Auto Sales (defendant's Exhibit "E", Page -1-) is obviously a dealer, but plaintiffs were unable to verify its status since there was no answer at the number listed for it in Los Angeles. This leaves a total of two (2) "retail purchasers" of Volvo automobiles. (See Morrison Affidavit attached hereto.)

II

The federal court would not have jurisdiction over either of these two purchasers, because their damage claims would not exceed $10,000.00

The damages to be considered for jurisdiction purposes are those alleged by plaintiffs in good faith. As the court stated in *Beckerman v. Sands,* 384 F.Supp. 1296 (S.D.N.Y., 1974):

"Defendants dispute the amount of provable actual damages, but because there is no indication that the [plaintiffs'] allegation is made in

bad faith, we accept arguendo plaintiffs' computation as a proper basis on which to calculate the jurisdictional amount." (*Beckerman, supra,* at 1299)

Defendant, Volvo, after denying that there are any damages in their Answer to plaintiff's Complaint, have now submitted *gross* profit margins, based on suggested retail prices and then argues therefrom that the damages per class member create federal jurisdiction.

The fallacy of defendant's presentation can be clearly outlined as follows:

1. *Gross* profit figures for the highest sticker price are given.

2. No evidence of average *net* profit of Volvo dealers is given.

3. No breakdown of expenses which must be deducted from *gross* profits to arrive at a reasonable *net* profit is provided.

It is submitted that Volvo dealers in business to make money cannot consistently discount auto prices below their break even point. To determine this break even point, and the margin available to them for reducing their prices, one must know their *net* profit figure. The *gross* profit (sales prices less cost of auto) is a meaningless figure.

As set out in the Affidavit of Harold Wright, from *gross* profit must be deducted dealer's preparation and shipping charges, salesman's commissions (four and one-half percent [4½%] of sale price for Northern

California union members) rent, advertising, salaries and all of the rest of the costs attendant to operating any business.

Volvo has compounded their deception to the court, by providing it with maximum gross profit figures. Attached as Exhibit "A" is Volvo's "Dealer Average Gross Profit Objective On New Volvo Retail Sales" prepared by Volvo setting out far more realistic figures as to what the alleged true *gross* profit Volvo dealers strive for. For the year 1974, the difference between gross profit figures as presented to the court by defendant in his Affidavit (defendant's Exhibit "G") and that expected by Volvo (Exhibit "A") is up to $800.00 per auto. Based on the foregoing with a true average gross profit for the period 1969 to 1974 of approximately $675.00 per auto and then deducting the foregoing expenses to arrive at a *net* profit, it is respectfully submitted that a reasonable estimate of damages for the price fixing alleged herein would be $100.00 to $200.00 per auto.

Plaintiff, of course, offers these estimates strictly for the purpose of providing a reasonable measure of damages in determining the amount in controversy. Plaintiff obviously cannot, at this point, stipulate to these or any other figures as binding on the ultimate damages to be proven in the case. It is ridiculous for defendants to suggest that Plaintiff make such a stipulation at this point.

Using plaintiff's figures, (as the rule stated in *Beckerman, supra,* requires,) even the two (2) purchasers remaining in defendants' list would not meet

the $10,000.00 jurisdictional minimum. The buyer with twelve (12) cars, at approximately $200.00 damages per car, would have $2,400.00 in damages, which when trebled would amount of $7,200.00. With the reasonable attorney's fee of twenty-five percent (25%), the total would only reach $9,000.00. The other buyer, with ten (10) cars, would be far short of the $10,000.00 mark. The fact is, that only two (2) of the purchasers listed by defendant even fit the description of plaintiffs' class members and these two (2) fail to meet the minimum required for federal jurisdiction. Defendant's Affidavits do not even begin to provide information upon which a court could rely in finding federal jurisdiction. The court is required to determine *to a legal certainty* that the asserted claims reach the minimum, and if the court believes the amount is "really less" than that claimed, it must deny jurisdiction. (*Kavit v. A. C. Stamm & Co.* [1974, 2nd Cir] 491 F.2d 1179.)

III

Defendant has been unable to produce *any* qualified class members with claims in excess of $10,000.00, assuming even if defendant were able to locate a few such persons, *Zahn v. International Paper Company* would prevent the court from exercising jurisdiction over the class and would require dismissal of virtually all the other class members.

Zahn v. International Paper Company, 414 U.S. 291; 38 L.Ed.2d 511 (1973) has haunted defendants since the first arguments on remand and is still the case which should finally be dispositive. In *Zahn,* the

United States Supreme Court considered class action claims by plaintiff owners of lakefront property which had allegedly been polluted by the defendant paper company. The suit was brought as a diversity action, and the District Court found that only the named plaintiffs satisfied the $10,000.00 jurisdictional requirement. The District Court was convinced "to a legal certainty" that the other class members *did not* have claims in excess of $10,000.00. The Supreme Court summarized the District Court's conclusions as follows:

> "Reading *Snyder v. Harris,* 394 U.S. 332, 89 S. Ct. 1053, 22 L.Ed.2d 319 (1969), as precluding maintenance of the action by any member of the class whose separate and distinct claim did not individually satisfy the jurisdic ional amount and *concluding that it would not be feasible to define a class of property owners each of whom had more than a $10,000.00 claim, the District Court then refused to permit the suit to proceed as a class action."*
>
> (*Zahn, supra,* at 507) (Emphasis Added)

The Supreme Court then affirmed the District Court's judgment in its entirety, stating:

> "As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. This rule plainly mandates not only that there may be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also requires that any plaintiff

without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims."

In *Zahn,* dismissal was necessary because it was the plaintiffs who had alleged federal jurisdiction and who failed to show that the class members met the jurisdictional minimum. In the present case, however, plaintiffs have always maintained that Federal Court does not have jurisdiction, and that the court should therefore remand the case to State Court, which would have jurisdiction over the class members. Here, there is no need to go through further motions in attempting to certify the class, only to have the court then dismiss the class action for lack of jurisdiction. Instead, the court should remand the case to State Court, which will have jurisdiction. As a practical matter, however, it will not even be necessary for the court to rely on Zahn, because defendants *have completely failed to show that any of the class members* here will have claims over $10,000.00. Zahn would only be important only if defendants *had been* able to find a few plaintiffs who did qualify.

CONCLUSION

Defendant has offered its final, novel theory for creating federal jurisdiction in this case. This theory fails, because twenty-six (26) out of twenty-eight (28) of the named parties do not fit the description of retail purchasers required for plaintiffs' class, and even the two (2) which remain fail to meet the jurisdictional minimum. The fact is, that despite a

great deal of ingenuity on the part of defendants' counsel, there is simply no factual or legal basis for satisfying the amount in controversy requirement in this case. Even if defendants were able to conjure up a few plaintiffs who met both the class description and the jurisdictional minimum, the class action would ultimately have to be dismissed for lack of jurisdiction. It is plainly time for this case to be returned to the State Court which does have jurisdiction over the class plaintiff has pled in her Complaint.

Dated: October 7, 1976.

Respectfully submitted,
Cartwright, Saroyan, Martin
& Sucherman, Inc.
/s/ Jay R. Martin
Jay R. Martin
Attorneys for Plaintiffs

AFFIDAVIT OF RANDALL D. MORRISON

State of California

County of San Francisco—ss:

I, RANDALL D. MORRISON, say:

1. I am one of the attorneys for the plaintiffs herein.

2. That I conducted an investigation by telephone inquiry to verify the status of the Volvo purchasers listed in defendant's Affidavits.

3. Twenty-one (21) of the twenty-eight (28) purchasers listed are identified by name as automobile leasing companies.

4. Two (2) of the alleged purchasers were not identified as auto lessors, but were in fact leasing divisions of banks:

a. Wells Fargo Bank of San Diego;

b. Security Pacific Bank.

(Both listed in defendant's Exhibit "D")

5. In addition to confirming the status of Security Pacific Bank, above, as an auto lessor, Mr. Robert Sproule of Security Pacific Bank, explained that only a few of the cars acquired by the Bank for leasing were ever *purchased*. Nearly all these automobiles, well over one hundred, were never purchased at all, but were in fact, *leased directly by the Volvo dealer to the customer, with the lease subsequently assigned by the dealer to the Bank.* Mr. Sproule stated that Security Pacific, Wells Fargo and numerous other banks had similar leasing arrangements with dozens of Volvo dealers.

6. Nationwide Auto Sales listed in defendant's Exhibit "E", is by name an auto dealer, but I was unable to verify its status because there was no answer at the number listed for this company in Los Angeles.

7. Two (2) of the alleged purchasers listed in defendant's Affidavits are, according to information from their employees, *lessees* of automobiles not purchasers. These are:

a. D. L. Glaze Company of San Francisco, (defendant's Exhibit "H")

b. National University of San Diego, (defendant's Exhibit "D")

8. Two (2) of the purchasers listed in defendant's Affidavits are actual, *retail purchasers* of Volvo automobiles:

a. First Federal Savings & Loan of Santa Monica, twelve (12) cars (defendant's Exhibit "A")

b. Prestige Optics of San Francisco, ten (10) cars (defendant's Exhibit "H")

The above facts are true and correct to the best of my information and knowledge.

Dated: October 7, 1976.

/s/ Randall D. Morrison
Randall D. Morrison

Subscribed and sworn to before me on this 7th day of October, 1976.

/s/ Linda M. Caputa
Linda M. Caputa, Notary Public in and for said State and County.

(Seal)

Linda M. Coputa
Notary Public—California
City and County of San Francisco
My Commission Expires June 7, 1980

Exhibit A

	1969	1970	1971	1972	1973	1974
Annex Motors	$550	$460	$500	$675	$700	$ 850
Autocar Europe	•	500	481	725	•	•
Daly City Datsun-Volvo	•	•	550	•	•	•
Dewey Eastman	550	575	•	675	•	•
Hanford Motors	•	500	•	•	•	•
Ken Keegan Imported Cars	550	500	500	675	650	800
Ken Keegan Volvo	•	•	•	•	650	800
Kendall Motor Co.	•	475	500	•	•	•
Park Motors	•	600	•	•	•	•
Peninsula European	•	450	475	675	650	850
Premier Volvo	550	475	475	•	•	900
Royal Motor Sales	550	480	500	675	750	900
Royal Volvo	•	500	550	675	650	800
Scandia Motors	•	450	550	675	750	850
Ed Barwick Plymouth	•	400	530	675	•	800
Carlson Motors	550	480	530	•	•	•
Ray Cokeley Motors	550	400	600	675	750	1000
Continental Volvo	550	500	550	675	750	850
Hayward Auto Imports	550	480	500	675	750	914
John's Motor Sales	•	500	530	•	750	•
Lester G. Lawrence	•	550	550	675	750	900
H. W. McKevitt Co.	550	500	550	675	750	900
Walt Martin Motors	550	500	530	•	•	•
Ogden Imports	•	500	530	675	600	800
Pierotti Motors	550	450	530	675	750	850
Torvick Sales Company	550	400	550	675	•	900
Turner Motors	•	550	600	•	750	950
Winter Motors Company	•	600	600	•	750	900

DEALER AVERAGE GROSS PROFIT OBJECTIVE ON NEW VOLVO RETAIL SALES

•Information not available.

CERTIFICATE OF SERVICE BY MAIL

I, LINDA M. CAPUTA, declare under penalty of perjury:

That I am a citizen of the U.S.A., over the age of 18 years and not a party to or interested in the within entitled cause; that I am an employee of Cartwright, Saroyan, Martin & Sucherman, Inc., and my business address is 160 Sansome Street, Suite 900, San Francisco, California 94104.

That I served by mail the following document:

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

in the following manner:

I enclosed a true copy of said document in an envelope, addressed as follows:

PAUL, HASTINGS & JANOFSKY
DANIEL H. WILLIAMS, III, ESQ.
ROBERT S. SPAN, ESQ.
555 South Flower Street, 22nd Fl.
Los Angeles, California 90071

I sealed said envelope and deposited it so sealed and addressed on the 7th day of October, 1976, with the said document enclosed therein and with the postage thereon fully prepaid, in the United States Post Office, in the City and County of San Francisco, State of California.

Executed on October 7, 1976, in San Francisco, California.

/s/ Linda M. Caputa
Linda M. Caputa